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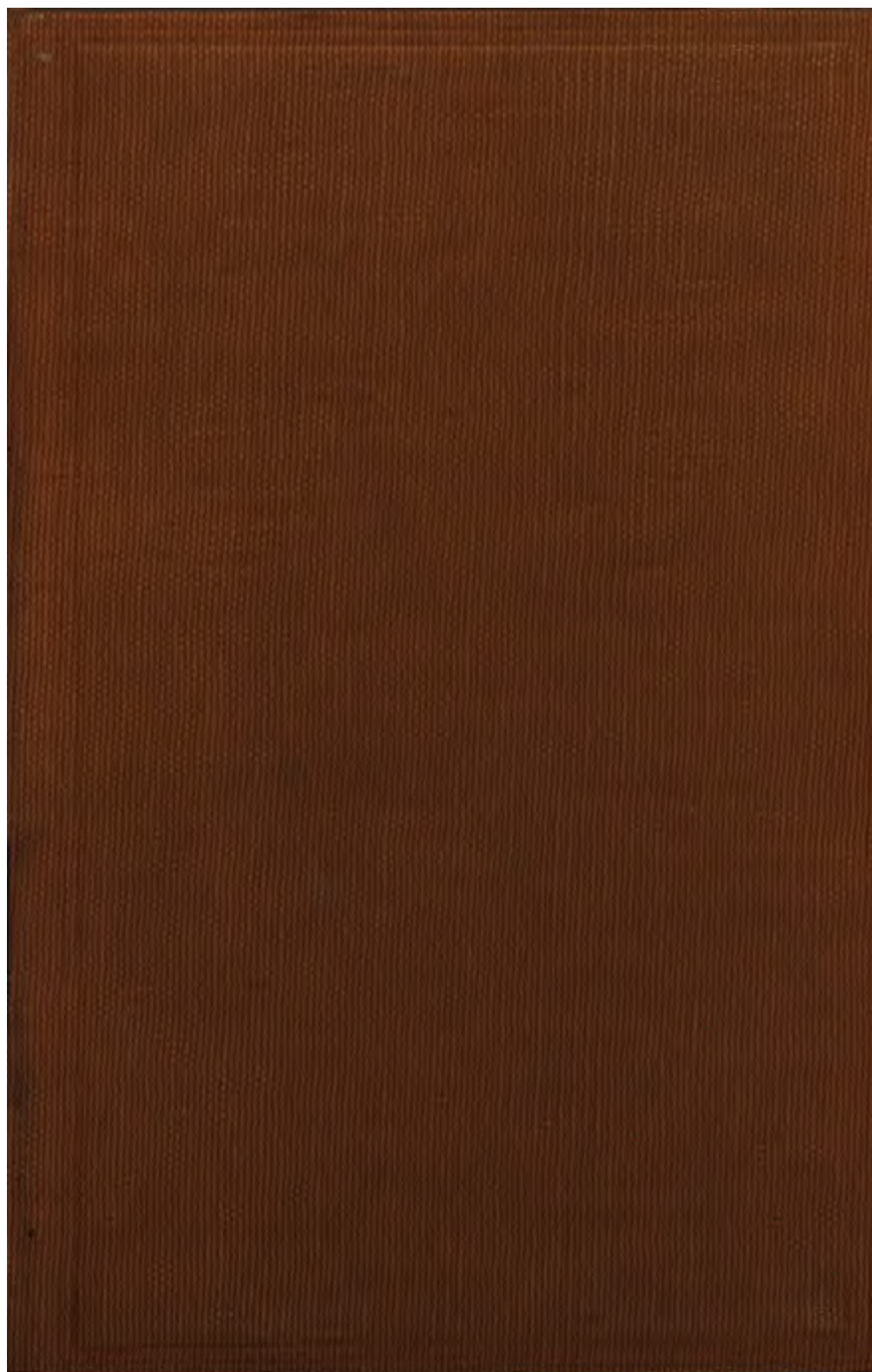
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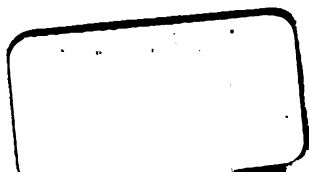
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REPORTS
OF
CASES ARGUED AND ADJUDGED
IN THE
Supreme Court of Florida,
DURING THE YEARS 1869-'70-'71.

JAMES B. C. DREW,
REPORTER.

VOLUME XIII.

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Judges of the Supreme Court

DURING THE TIME OF THESE REPORTS.

HON. EDWIN M. RANDALL, Chief Justice.
HON. OSSIAN B. HART, } Associate Justices.
HON. JAMES D. WESTCOTT, JR., }

JAMES B. C. DREW, Attorney General.
CHARLES H. FOSTER, Clerk Supreme Court.

Judges of the Circuit Courts.

DURING THE TIME OF THESE REPORTS.

FIRST CIRCUIT— HON. HOMER G. PLANTZ.
SECOND CIRCUIT— HON. P. W. WHITE.
THIRD CIRCUIT— HON. THOMAS T. LONG.*
HON. WILLIAM BRYSON.†
FOURTH CIRCUIT— HON. ALVA A. KNIGHT.‡
HON. THOMAS T. LONG.||
FIFTH CIRCUIT— HON. JESSE H. GOSS.
SIXTH CIRCUIT— HON. JAMES T. MAGBEE.
SEVENTH CIRCUIT— HON. JOHN W. PRICE.

*Resigned October 11, 1870. †Appointed October 12, 1870. ‡Re-
signed September 29, 1870. ||Appointed October 11, 1870.

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NOTE.—The Head Notes in each case were prepared by the Judge who delivered the opinion, as required by law.

REPORTER.

ERRATA.

- Page 183.—4th line from top, for "necessary" read "unnecessary."
- Page 240.—3d line, a "period" instead of "comma," after word payment.
- Page 248.—11th line, for "shall" read "should."
- Page 635.—15th line, for "were" read "was."
- Page 231.—Strike out "Held" at the end of the first paragraph of the syllabus.
- Page 334.—At the end of 8th line from bottom, for "on" read "or."
- Page 393.—The brief of Judge Woodward here printed was prepared with reference to an application for a rehearing, and was inserted by mistake, instead of his brief used upon the argument.
- Page 410.—7th line from bottom, for "legislation" read "legislature;" and in the next line insert "of" after the word "purpose."
- Page 467.—For "Wallace, 51 Howard," read "Aspinwall, 21 Howard."
- Page 477.—For "principle," in 3d line of 2d paragraph, read "principal."
- Page 499.—For "Field," in 4th line from bottom, read "Tidd."
- Page 514.—5th line from top, for "assigned" read "consigned."
- Page 552.—14th line from top, after the word "existed" insert "such remedy."
- Page 626.—9th line from bottom, for "1869" read "1863."

DECISIONS

OF THE

Supreme Court of Florida.

AT TERMS HELD IN 1869-'70-'71.

STATE OF FLORIDA *ex rel.* EDMUND C. WEEKS, VS. ROBERT
H. GAMBLE, COMPTROLLER.

Section 7, and Article V, of the Constitution of this State, provides that "when any office, from any cause, shall become vacant, and no mode is provided by this Constitution, or by the laws of the State, for filling such vacancy, the Governor shall have power to fill such vacancy by granting a commission, which shall expire at the next election:" *Held,*

1. That the power vested in the Governor by this section is not a power to fill the office for the *unexpired term*; that this power remains with the people, and that the power here conferred is to provide an incumbent for the office between the date of the removal or death of the regular incumbent, and the filling of the office by an election by the people.
2. That while the Constitution does not fix the precise time for the "next election," yet it is the duty of the authorities to see that the time of this election is not indefinitely postponed at the expense of the rights of the people.
3. Where provision is made by law for the salary of an officer, the drawing of a warrant by the Comptroller is a ministerial act, which may be enforced by mandamus, and the Court may, in such proceeding, determine whether the appointment of the officer is void, where there is no other incumbent of the office exercising its functions by color of right.

Mandamus to the Comptroller of the State of Florida.

On the 24th of January, A. D. 1870, there being a vacancy in the office of Lieutenant Governor of the State of Flo-

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rida, the Governor of said State appointed and commissioned Edmund C. Weeks, the petitioner, as such Lieutenant Governor, who accepted, qualified and discharged the duties of said office for the first quarter of the year 1870. On the 7th of June, 1870, the petitioner made his requisition upon the Comptroller for his salary for the time stated. The Comptroller, denying that there was any power in the Governor of the State to make such appointment, refused to issue his warrant. On the 8th of June, 1870, Edmund C. Weeks filed his petition in this Court setting up the fact of the vacancy in the said office, his appointment to fill said vacancy, his qualification and discharge of its duties, the making of a requisition upon the Comptroller for his salary for the past quarter, and the refusal of the Comptroller to issue the warrant as required. In accordance with the prayer of the petition, an alternative writ was awarded returnable on the 9th of June. To this writ the Comptroller filed his return at a subsequent day of the term, setting forth that the Governor had not at the time of the said appointment power under the Constitution and laws of this State to fill a vacancy in the office of Lieutenant Governor.

The question involved in the issue made up, is the authority of the Governor to fill a vacancy in the office of Lieutenant Governor at the date of the appointment of the petitioner. That there was a vacancy in the office at the time was admitted.

J. P. C. Emmons for Petitioner.

The relation is full and certainly presents a *prima facie* case of right to the office.

The return denies the constitutional right to appoint. Issue taken.

The Relator cites art. 5, sec. 7, of the Constitution of the State, and Laws 1868, pages 2 and 3, 33 and 34.

If in the laws 1868, page 34, the exception precludes the

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Lieut. Gov. as an *officer of the Legislature*, then there is no provision in that law, and the power of appointment is under art. 5, sec. 7, of the Constitution.

If the Governor had the power to appoint, the salary is fixed at \$2,500, payable quarterly on the requisition of the Lieut. Gov.; sec. 6, art. 16, Constitution.

The act required of the Comptroller is purely *ministerial*.

The Comptroller had no discretion but to obey the direction of the Constitution. This, if the applicant had the right to demand it.

That a court having jurisdiction of the writ will inquire into that right, and give all the relief necessary, and even inquire into the act of the Governor in granting the commission, and sustain the ground taken by the relator, see *Marbury vs. Madison*, 1 Cranch, 137; *Danley vs. Whitely*, 14 Ark. 687; *Collins vs. State*, 8th Indiana, 345; 8 B. Monroe, 648, which is full, citing *Divine vs. Harvey*, 7 Mon. 439, *Kendall vs. U. S.*, 12 Peters, 524, and *Marbury vs. Madison*, before cited, and reviewing them.

These cases seem fully to sustain the positions taken by the relator.

George P. Raney, for Respondent.

Section 7, article 5, Constitution, provides:

"When any office from any cause shall become vacant, and no mode is provided by this Constitution, or by the laws of the State, for filling such vacancy, the Governor shall have the power to fill such vacancy by granting a commission which shall expire at the next election."

The Relator relies upon this section for the validity of his appointment as Lieut. Governor by the Governor. Before the Governor can exercise the appointing power under this provision, there must be two concurring circumstances:

1st. There must be a vacancy.

2d. There must be the absence of any mode provided by

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the Constitution *or* by any *existing law* for filling such vacancy. Clark vs. Irwin, 5th Nevada, 127, *et seq.* If either of these circumstances is wanting, the Governor cannot appoint.

It is admitted that there was a vacancy when the appointment was made.

Admitting that the *Constitution* does not provide a mode for filling such a vacancy as existed in the office of Lieutenant Governor when the Relator was appointed by the Governor to fill such vacancy, it is still submitted that the *laws of the State* did provide a "*mode*," and this mode, Respondent contends, should have been pursued in filling the vacancy. This mode is provided by the 4th sub-division of the 3d section of an act entitled "An act to provide for the Registration of Electors, and the holding of Elections," (p. 2 acts of 1868,) which is as follows: "When, in any other case of a vacancy, *not particularly provided* for, the Governor *shall* in his *discretion* direct, special elections shall be conducted and the result thereof canvassed and certified in all respects in like manner as general elections."

Here is a mode provided by "*the laws of the State*" for filling the vacancy.

Preceding paragraphs of this 3d section provide for filling by *special election* all vacancies in all such State and County offices (except Governor and Lieutenant Governor,) as under our Constitution are elective. This 4th paragraph can then apply only to vacancies in the offices of Governor and Lieutenant Governor, and the office of Governor being filled, it could at the time of the appointment in question have applied only to a vacancy in the office of Lieutenant Governor.

The conclusion is that at the time the Governor appointed the Relator Lieutenant Governor, the laws of the State enacted under the Constitution (section 24, article 4,) did provide a mode for filling the vacancy, and that mode was a *special election* to be called *when the Governor in his discretion should direct*.

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The peculiar discretion vested in the Governor as to calling the election is confined *to the time* when he shall call it. By an abuse of this discretion he may fail to call it *at all*, but this does not change the character of the discretion.

It is not a discretion as to *whether the vacancy shall be filled by special election or by appointment*. The laws of the State provide for filling it by *special election*, and although this election is to be called at the Governor's discretion, yet the vacancy if filled must be filled by a *special election*.—The idea of filling it by appointment is repugnant to the character of the office under the Constitution, and this office being one of the few elective offices under our system, it is to be presumed that the Legislature intended to preserve to *the people* the right of selecting its incumbent.

The vesting of this discretion finds some explanation in the fact that the ordinary duty of the Lieutenant Governor is merely presiding over the Senate during the sessions of the Legislature, and that should a vacancy in the office occur on the approach of a general election, it would be useless or impolitic to put the people to the expense and trouble of a special election in the meantime, particularly so should no session of the Legislature intervene. As to *Mandamus vs. Comptroller 3 Florida, 206; Brashear vs. Mason, 6 Howard, 92; Decatur vs. Paulding, 14 Peters, 513.*

WESTCOTT, J., delivered the opinion of the Court.

The principal question involved in this case is the extent of the power of the Governor under Sec. 7, Art. V, of the Constitution. This section is as follows:

"When any office, from any cause, shall become vacant, and no mode is provided by this Constitution or by the laws of the State for filling such vacancy, the Governor shall have the power to fill such vacancy by granting a commission, which shall expire at the next election."

It is evident that the first thing to be considered in the construction of this sentence is, at what period of time the

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vacancy therein mentioned commences, and at what period of time, or upon the happening of what event, it ends. This being determined, if there is a mode provided by the Constitution or by the laws for filling the office during that period of time embraced between the commencement and the end of the vacancy, then it is plain that the Governor has no power to fill the vacancy; otherwise he has such power. The whole matter is therefore deducible to two questions:

First. What is the vacancy intended to be provided for by this section? What period of time does it embrace?

Second. Does the Constitution or the laws provide a mode for filling such vacancy?

The vacancy in this instance commenced with the judgment of ouster of the former incumbent. It is plain that the end of the vacancy, or, which is the same thing, the point of time at which the "commission" which the Governor "has power" to grant "expires," is the "*next election*." The event, therefore, which gives us the time at which the power of the Governor ends and at which his commission expires, is the "*next election*," and that as a matter of course must be the event which gives us the point of time at which the vacancy ends. It is for us to give a construction and fix the meaning of these words in the connection in which they stand.

The position taken by the relator in this case is that the "election" meant is the "election" to be held in A. D. 1872, for a Lieutenant-Governor, to hold his office for four years. It cannot be doubted that this is an election, but is it the "next" election contemplated by the Constitution?

The regular incumbent of the office of Lieutenant-Governor, the Constitution provides shall be chosen by the people. They are the power to which is confided the right of selection by that instrument, and any construction of the Constitution which restricts by implication the right to exercise the elective franchise in the selection of this officer, and ex-

tends executive power in that direction, is inconsistent with the intent and purpose of the framers of the Constitution in creating this office. Their view plainly expressed is that its incumbent should be the choice of the people. Says C. J. Parker, (*Henshaw vs. Foster*, 9 Pick. 317): "In construing so important an instrument as a Constitution, and especially those parts of it which affect the vital principle of a republican government, the elective franchise, we are not on the one hand to indulge ingenious speculation which may lead us wide from the sense and spirit of the instrument, nor on the other, to apply to it such narrow and constrained views as may exclude the real object and intent of those who framed it."

We must suppose that where there is a restriction upon the exercise of the elective franchise in reference to a matter which is generally made the subject of its exercise, that there was an anticipated evil or inconvenience not remediable by the exercise of the elective franchise, and the grant of power giving a remedy for this inconvenience should not be so construed as to postpone the selection by the people beyond a period at which it can be conveniently made. On the other hand, if there is in express terms this grant of power, we must not struggle to apply to it such narrow and constrained views as may exclude the real object and intent of those who framed it, and where there is in very words a grant of power which is vested to cure temporary inconveniences attending the selection of officers to fill vacancies in elective offices, we must, as judicial officers, acting independent of the prejudices of the hour, give it effect.

The question here submitted is very grave and important as to the present, and its ultimate consequences and effect in the future administration of the government is not less so. We cannot restrict our views to the present; we must embrace the entire future, and our decision (except that it may determine this precise case,) is not of value equal to the paper which contains it, if it is not unbiased by any consideration

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of expediency, policy, or emergency. Applying the general principles before enunciated as applicable to the construction of such a clause as this in a Constitution, it is plain that the election contemplated by the Constitution is the next election after the vacancy, and not the election which is to be held to fill a new term to commence in A. D. 1872. The election contemplated by the Constitution is an election to fill the balance of the *unexpired term*, which, in the absence of legislation, the Governor shall call at the first convenient season, and is in no sense an election to fill a *new and another term*, which takes place without reference to the vacancy, under provisions of laws having nothing to do with the subject of vacancies—laws enacted to fill regular terms of offices created by the Constitution for the ordinary administration of the government. The power to fill the *unexpired term* is a part of the original power of the people to select. The Constitution has simply carved out from this original power a period between the date of the removal and the “next election by the people,” during which a temporary power of the Executive is permitted to operate, so that the public may not suffer. There are many offices which could not be vacant a week without serious consequences. Whenever there is an election by the people, the constitutional term under this executive appointment “expires,” because the vacancy contemplated by the Constitution is determined by the selection of an incumbent by the original power. It may be said that *the time* at which the next election is to happen is not fixed by the Constitution. True, the Constitution does not fix the precise time of the election, but it fixes the “next election” as the limit, and it is the duty of the authorities, independent of legislation, to see that the period of this election is not indefinitely postponed at the expense of the rights of the people. Because the Constitution does not fix the time, affords no ground for us on the one hand to extend the limit to a time which was certainly not contemplated, or on the other hand to declare

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that the Governor has no power in the premises. Whether it is within the power of the Legislature to fix *the time* of the election of this officer by the people at a date subsequent to the time at which elections are held throughout the State for officers to be voted for by the people of the State, or whether the Governor, under an act of the Legislature vesting a discretion, can so act as to postpone the election of the officer beyond such a period, are questions which do not arise in the determination of this case. For myself, I will remark that I cannot anticipate action so manifestly inconsistent with the spirit and intent of the Constitution, so in opposition to the true principles of republican government, upon the part of any officer of the government. I will further remark, that the discretion vested in the Governor under the act of 1868, is a sound discretion; one which should not be controlled by any other consideration than the right of the people to select this officer.

We have thus answered the first question necessarily involved in the construction of this clause of the Constitution, and the period of time embraced by the vacancy there contemplated is thus determined. I have never doubted that this was the meaning of the Constitution; not simply because it is the necessary result of the application of the true principles of construction, and results in vesting a power necessary to the due administration of the government, but from the additional fact that the power which by this construction is vested in the Executive, has been exercised by the Executive of a State with a Constitution, precisely similar in effect to ours, for twenty years, and the additional fact that the courts of this State for the same period have time and again given the same construction that we give it.

Art. 8, Sec. V, of the Constitution of California, provides that "when any office shall from any cause become vacant, and no mode is provided by the Constitution and laws for filling such vacancy, the Governor shall have power to fill such vacancy by granting a commission, which shall expire

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at the end of the next session of the Legislature, or at the next election by the people." It will be seen by a comparison of this clause with the corresponding clause in our Constitution, that the power as to vacancies in offices which are elected by the people, is precisely the same. The question which we are now considering first came before the Supreme Court of California (3 Cal., 503) in 1851. The Legislature in this case had created a judicial district appointing no judge therefor, and the Governor under this clause of the Constitution had made an appointment in May, 1851. At the general election in October of the same year another person was elected by the people. The appointee of the Governor claimed to hold for the balance of the unexpired term. The court say, this "section of the Constitution does not authorize the executive to supply the vacancy for the term. It contemplates that the people shall supply the balance of the unexpired term. The Constitution not authorizing the executive to fill the vacancy to the end of the term, this power must be exercised by the people. It is contended that the executive appointment should continue to the end of the term. This is not the language of the instrument, and we will not by implication confer that power upon the executive which is so repugnant to the spirit and policy of the Constitution. The words the 'next election by the people, mean the next election after the vacancy happens." This being the opinion of the court, the appointee of the Governor was ousted.

The views of the Supreme Court of California, in this case, have been reviewed by that court in a number of subsequent cases, and have been uniformly approved and followed. (1 Cal., 536, 26; 7 Cal., 525; 8 Cal., 19; 14 Cal., 188; 37 Cal., 621, 23, 24.) The court remark, in considering one of these cases, (37 Cal., 621,) that "the object of this clause was to prevent a public inconvenience, arising from the want of a party authorized for the time being to discharge the duties of a public office," and that "this power was vested in the

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Governor to make merely a *temporary* appointment." In considering another case (14 Cal., 187,) the court remark, in reference to a vacancy in an elective office, "the Governor might fill the vacancy, but the appointee would only hold, by virtue of the appointment, until the next general election, or at most, until the qualification of the person to be then chosen by the people." It is entirely unnecessary to encumber this opinion with lengthy quotations from these opinions of the Supreme Court of California, extending over a period of twenty years, and made by judges of every shade of political opinion. They leave no doubt about the character of the power vested in the Governor under this clause, and we cannot see the least room for even a doubt upon this branch of the subject.

The only other State having a similar Constitution, so far as we have been able to ascertain, is the State of Nevada, and no decision covering this precise point has been made by its courts. Our opinion, therefore, is that the time covered by the vacancy which the Constitution authorizes the Governor to fill, is embraced between the death, resignation, or removal of the incumbent and the filling of the unexpired term by an election by the people, the purpose of the Constitution being to provide a person to discharge the duties during the interval.

In this case the vacancy is admitted; it is not set up that any such election has been held, and the only remaining question to be considered in reference to this branch of the case is, whether a mode is provided by the Constitution or by the laws for filling the vacancy.

The respondent has called our attention to the provisions of a law which authorizes the Governor to call an election to fill the office for the balance of the unexpired term; (page 2, Acts of '68.) The election there authorized is the means by which the constitutional vacancy expires, and as a matter of course, the party there selected cannot fill the office for the time which precedes his election, and this is the time

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during which the Constitution authorizes this appointment by the Governor. Our attention has also been called to the 2d section of the act of August 6, 1868, relating to vacancies, (acts of 1868, page 34.) If it is admitted that the Lieutenant-Governor is an officer of the Legislature, within the meaning of this section of the act, then no mode is provided for filling the vacancy, and the Governor's power attaches under the Constitution; and if the Lieutenant-Governor is not such officer, then the Governor might appoint under this act, in which event the commission could not extend beyond the time embraced in the constitutional vacancy. A member of the Legislature is not an officer within the meaning of this clause of the Constitution. The Lieutenant-Governor is an executive officer. He is not a legislative officer, although one of his functions is to preside in the Senate, and to vote in a certain event.

Is there a mode provided by the Constitution for filling the vacancy?

If, during a vacancy in the office of Lieutenant-Governor, the duties and functions of the office devolve by the Constitution upon another, either until the next election or for the balance of the term, there is no doubt that this is a filling of the vacancy within the meaning of the Constitution. This is settled by the authorities, (37 Cal., 621, 23, 24; 28 Cal., 390, 91, 92, and other cases there cited.) It is urged that the President *pro tem.* of the Senate discharges the duties and performs the functions of the Lieutenant-Governor when there is a vacancy in that office. This is far from being correct. The principal purpose for the creation of the office of Lieutenant-Governor is to perpetuate the office of Governor, which is essential to the due administration of the government. The Lieutenant-Governor is President of the Senate. In case of the impeachment of the Governor, or his removal from office, death, inability to discharge his official duties, or resignation, he discharges the duties of the office of Governor for the residue of the term, or until the disability

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ceases. In case of the impeachment of the Chief Justice, the Lieutenant-Governor presides. The President *pro tem.* of the Senate would not, in the case of the impeachment of the Governor, discharge the functions of the office of Lieutenant-Governor to act as Governor, nor would he, in case of the lunacy of the Governor, or any other inability to discharge his official duties, perform the duty of Lieutenant-Governor to act as Governor during the continuance of this inability. The President *pro tem.* of the Senate, by the express terms of the Constitution, can "*act as Governor*" only "*during a vacancy in the office of Governor,*" and impeachment only operates to disqualify from performing the duties of office, and does not create a vacancy. The Governor, when he legally acquires his office, and is eligible, has an estate in it as a property of which he cannot be divested, except by conviction upon impeachment; and we would have in this case a legal incumbent of the office, and a temporary disqualification to perform the duty. We do not see that this constitutes a vacancy in the office. How can there be an estate, a property in an office, in a person, and a contingent right to exercise all the authority attached to it, and yet the office be vacant?

Chief Justice Murray, considering this clause of the Constitution in 2 Cal., 213. (whose views became the views of the court by the subsequent concurrence of Justice Heydenfelt, 2 Cal., 610,) says the terms "*vacancy in any office from any cause,*" must be construed vacancies in *constitutional offices* from any cause which would operate a vacancy *under the Constitution*, and vacancies in offices *created by the Legislature* from any cause provided by law. "The rule is that constitutional offices only become vacant by some express provision of the Constitution, by death, resignation, or *removal by impeachment* for proper cause." (2 Cal., 213.) The language of the Constitution of California providing when the President *pro tem.* shall act as Governor, is precisely the same as that of Florida, except that the

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words "President of the Senate" are used instead of the words "President *pro tem.* of the Senate." But if it is conceded that impeachment created a temporary vacancy in the office, certainly simple inability would not do so, and the right of the Lieutenant Governor to discharge the duty and perform the functions of the Governor in case of inability, would certainly not devolve upon the President *pro tem.* of the Senate in the event of a vacancy in the office of Lieutenant Governor. I cannot come to the conclusion that this partial performance by the President of the Senate, of the duties or functions of the office of Lieutenant Governor, is a filling of the vacancy within the meaning of this section of the Constitution. The result is that the Assembly, in the event it impeached the Governor when there was no Lieutenant Governor, would create a hiatus in this department of the government to the extent that the Governor is the sole representative of executive power. No law could be enacted, no fine could be remitted, no pardon granted, no commission could be issued; in fact, we would strike from the government, in this contingency, one of its co-ordinate departments, and have a state of perfect disorganization, amounting to little less, if, indeed, it would not be a temporary suspension of the government by the destruction of one of its essential and necessary parts. It cannot be denied that the President *pro tem.* of the Senate would discharge *some* of the functions of the office, but certainly no candid mind would insist that this was a filling of the office within the meaning of the Constitution. Our conclusion is, that the Governor had authority to grant the commission in this case, to expire at the next election.

The only remaining question involved in this case is whether it is a case for mandamus.

The Comptroller has refused to draw his warrant in favor of the relator for his quarter's salary as Lieutenant Governor of Florida, and this proceeding is instituted by the relator to obtain a peremptory writ from this court directing

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the Comptroller to perform this act. The Comptroller admits that at the date of the appointment of the relator there was a vacancy in the office of Lieutenant Governor, that the relator has a commission in due form signed by the Governor, that the amount claimed is legally due, if he is Lieutenant Governor. No question as to the eligibility of the party is raised, and it is not denied that there is an appropriation by law for the salary of the Lieutenant Governor. His sole reason for not issuing the warrant is, that in his opinion the Governor had no authority fill the vacancy, and the appointment is void.

An examination of the decisions of the Supreme Court of the United States in reference to the subject of mandamus, when officers of the Treasury Department are sought to be controlled in matters pertaining to the public money, will show such great difference in the opinions of the eminent jurists composing that court, such a diversity of views as to the extent of the jurisdiction of the courts, as well as to what constitutes a ministerial act as distinguished from an act involving discretion, that one seeking the true rule as established by this authority is left in great doubt.

In the case of the United States vs. Guthrie, 17 How., 303, the Chief Justice and three of the Associate Justices held that "no court has the power to command the withdrawal of money from the Treasury of the United States to pay any individual claim whatever." Mr. Justice Daniel, delivering an opinion which was concurred in by the Chief Justice and Associate Justices Wayne and Catron, remarks that "the only legitimate inquiry for our determination upon the case before us is this: whether, under the organization of the Federal government or by any known principle of law, there can be asserted a power in the Circuit Court of the United States for the District of Columbia, or in this court, to command the withdrawal of a sum or sums of money from the Treasury of the United States to be applied in satisfaction of disputed or controverted claims against the United States."

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This question was answered in the negative. Of the five remaining justices, four concurred in the judgment upon other grounds, expressing no opinion upon this question, and one of the justices, (McLean,) dissented.

It would be difficult to reconcile these views of a minority of the court with the result of the views and judgment of the Supreme Court of the United States in the case of *Kendall vs. Stokes*, 12 Pet. 524. In that case, under a special act of Congress, a matter of controversy between Stokes and others and the Postmaster General was referred to a commissioner to examine the account and report any balance he might find due from the Post Office Department, and the Postmaster General was required to pay such balance by entering a credit on the books of the Department. The commissioner reported a balance in favor of Stokes. The Postmaster General refused to credit the whole sum. Stokes applied to the Circuit Court for mandamus directing the credit. Six of the judges of the Supreme Court held it a proper case for mandamus, and that the Circuit Court had jurisdiction.

In the case of the *United States vs. Guthrie*, the salary of the judge was fixed by law and an appropriation of salary made by law, and if payment of a sum admitted to be due by entering a credit in the case of Stokes was a ministerial act for the performance of which a mandamus would lie to an executive officer, I am unable to see any difference in principle when the payment of the salary of the judge was to be made by drawing a warrant, as the entering the credit and the drawing the warrant are certainly equally ministerial acts. We cannot endorse the views of Justice Daniel in the *Guthrie* case, (representing a minority of the court,) as to the authority of the court in any event and under any circumstances to direct a payment of money. It is in conflict with the principles enunciated in the case of Stokes, which is a decision of the majority of the court, in our judgment, correctly settling the question.

In the case of *Decatur vs. Paulding*, 14 Peters, 521, the

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relator sought a mandamus to control the action of the Secretary of the Navy to the end that she might be paid certain moneys which she alleged were due under an act of Congress. The payment of this sum was an act which involved upon his part, in the opinion of a majority of the court, the exercise of discretion and judgment in construing the resolution, and was a matter committed to his care in the ordinary discharge of his official duties. The court held that there *was no jurisdiction to issue the mandamus*. Mr. Justice Story and Mr. Justice McLean say nothing in reference to the question of jurisdiction, but remark that they cannot agree with "a majority of the judges who hold that the construction of this resolution was a duty in the discharge of which an executive discretion may be exercised. The law is directory and imperative, and admits of the exercise of no discretion on the part of the secretary. The amount is fixed by law and is therefore certain." Mr. Justice Baldwin, in a lengthy and able opinion, distinguished between jurisdiction and its erroneous exercise, holding that there was no doubt of the jurisdiction in the case, and holding further that the construction of the resolution must be decided by the court, not the Secretary, and that if the right to the sum existed by law, the payment was a ministerial act.

In the case of *ex-parte* Secombe, 19 How., the court denied that a mandamus could be granted to restore an attorney who had been disbarred without notice or hearing, intimating that the remedy was by writ of error. In *ex-parte* Bradley, the court restored an attorney to his office upon mandamus, deciding that the order disbarring him was not *reviewable by writ of error*, and that mandamus was the recognized remedy. These cases did not relate to the Treasury Department in any respect, and they are only stated to show the great difference in the views entertained by the eminent jurists composing that court at different times as to the office of mandamus.

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In the State courts, I have found two cases where they have not hesitated to apply the remedy to a case of this character, (8 B. Mon., 649, 15 Iowa, 546,) where mandamus was sought to enforce the issuing of a warrant for the salary of a public officer, and both of these cases involved the question whether the relator was *de jure* the officer he claimed to be. In the case of Hardin the Governor had presumed to remove him from the office of Secretary of State on account of acts which the Governor decided constituted an abandonment of the office and had made an appointment to fill the vacancy. In the case of Bryan, the Governor had declared his office vacant for his failure to discharge its duties and had appointed another to fill the vacancy. In both cases, the question of the power of the Governor to fill the vacancy was examined, and in both cases warrants for the payment of money were directed to be issued. There is a difference between this case and these two cases. In the two cases cited there were actual incumbents other than the relator, claiming under color of right. In this case, the party who had been elected had been pronounced ineligible and judgment of ouster awarded against him by this court months before this appointment by the Governor. It is very doubtful whether the title to the office would be inquired into upon mandamus where there are conflicting claimants and a party other than the relator is actually filling the office. 5 Hill, 616; 3 Nev., 221; opinion of Justices Curtis, Nelson, Grier and Campbell, 17 How., 305.

In this case it is not denied by the respondent that the act which the mandamus is sought to enforce is a ministerial act. The sum due the Lieutenant Governor is fixed by law; the Constitution provides that it shall be payable on his own requisition; the Legislature has appropriated a sum to be applied to the salary of the Lieutenant Governor, and when the requisition is made (and it is admitted that it has been made in this case,) the Comptroller must issue his warrant. It is, however, entirely proper for the Comptroller, if he be-

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believes that the party is not *de jure* an officer, to decline to issue the warrant, not because the final decision of such a question as this is a function which appertains to him as an executive officer, but because, as a faithful guardian of the public treasury, he should require the decision of the question by that department of the government whose province it is to decide such a question of constitutional law before he will involve the State.

It must be obvious that if the Comptroller can, under these circumstances, finally decide such a question and the courts cannot control the matter, then the Comptroller cannot be compelled to perform a duty imposed by the Legislature, insisted upon by the Executive and determined by the Judiciary. He might refuse to pay any officer under any circumstances, and there would be no redress.

In such a case as this, the relator, unless he has a remedy by mandamus, has no remedy. By way of parenthesis we remark, that it is not intended by anything which we have written to say that a *de facto* officer discharging the duties of an office is not entitled to his salary, or to let the compensation of an officer depend in all cases upon the question whether he is *de jure* an officer. The determination of this question is not essential, as in any event the *de jure* officer would be entitled, and there is no *de facto* officer here, the former incumbent having been long since ousted by a *quo warranto* proceeding. For these reasons, therefore, unless there is something in the nature of this constitutional question which would prohibit the court from its consideration upon a mandamus, the remedy desired must be applied.

This brings us to the last question, viz: Can we enquire upon this proceeding whether the appointment of the relator by the Governor was void? In our opinion this is a question the determination of which is incidental to the decision of the principal question in the case, and as it involves the right of no party not before the court, we can determine

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it. Was there another party actually filling the office, who had been admitted and sworn and who was in by color of authority, it might be otherwise. In the event it was alleged that the party was ineligible simply, we doubt whether this would be a reason to deny the salary, and for this cause we doubt whether we would inquire into that question upon this proceeding. We do not doubt our authority to determine the question whether the appointment is void—an enquiry which, in our judgment, would be no bar to a *quo warranto* proceeding to determine the question of eligibility of the incumbent, or his title or right to an existing office.—We here simply enquire whether there can be under any circumstances an incumbent of such office by virtue of an executive appointment. That the legality of such an appointment by the Governor can be enquired into, we do not doubt. We do not think it is the province of the Governor to determine finally upon the question of his powers in a matter of this kind. His action does not estop judicial enquiry, where it becomes the proper subject of consideration in a case involving individual rights.

We deem it proper in this connection to show the distinction between this case and the case of Towle vs. State, (3 Fla., 212,) as it might be supposed there was a conflict. In that case, the claim was for services rendered by a sheriff in a criminal prosecution by the State. There had been no appropriation by the Legislature for the benefit of this particular officer for this special service, (6 How., 100,) nor had there been any action by the Legislature admitting that the costs there incurred in a prosecution for assault and battery were properly chargeable against the State in any event. The party attempted to coerce the officer to pay a sum which the State had never admitted was due. The court in that case say that the remedy for the party was legislative action, and we cannot doubt that had the Legislature passed an act admitting the claim and making an appropriation for this particular service, the court, in the event of the

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refusal of the Comptroller to draw his warrant, would have awarded a peremptory mandamus. Otherwise, the Comptroller's action is final, and neither the Legislature nor the courts can control him. He can refuse to pay any admitted indebtedness of the State, and its payment could never be enforced. There being no appropriation for this particular service, the State, through the Legislature, had not consented to the claim, and without such consent, any action of the court enforcing its payment by the officer would have been equivalent to sustaining an action by the party against the State, and giving a judgment against the State. It is well established that this cannot be done even where the State places herself in the attitude of a plaintiff and upon a plea of set-off a balance is found in favor of the defendant. (11 How., 272.) Where, however, the State consents to the claim as in this case, by action of the Legislature, the party has a right to the assistance of the court, which may compel the performance of a ministerial act necessary to satisfy the claim and to accomplish the purpose of the law.

The Supreme Court of the United States, speaking of this subject, (12 Pet., 611,) says: "The United States could not of course be sued, or the claims in any way enforced against the United States, without their consent obtained through an act of Congress." If the consent by the Legislature was to pay a claim which the Constitution prohibited, that would be an argument against our granting the writ, but no question of this kind is raised here. To make the cases analagous we should have had legislation admitting the claim of the sheriff, in the event he was a sheriff. Had this been the case, and the Comptroller had denied that the party was *de jure* sheriff, and placed his refusal upon this ground, the cases would have been analagous. The question would then have been whether the courts were not the proper tribunals to determine whether the party was not sheriff, and in the event he was, whether they could not compel the Comptroller to draw his warrant for a certain sum admitted by the

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Legislature to be due. In the absence of legislation or of constitutional provisions of this character, it is not denied that the Comptroller's action in reference to a claim is final. This is an exercise of judgment and discretion which properly appertains to him, and we cannot control it, but where the Legislature has acted, he has no such discretion. If he refuses to pay the claim, the party must go to the Legislature.

It may be remarked that the extract made in the case in 3 Fla. by Chief Justice Douglas from the opinion of Mr. Justice Catron, in the case of Decatur vs. Paulding, does not represent the views of the Supreme Court of the United States. In that case, Mr. Justice Catron dissented from the opinion of the court, and there as elsewhere he maintained that the courts could not by mandamus compel an officer to perform a ministerial act, because if it had jurisdiction to determine what constituted a ministerial act as distinguished from an executive duty, there was no obstacle to its making all executive duties ministerial acts, having the power to define them. Nor do we think that the remark there made by Mr. Justice Catron in reference to the case of Kendall is correct. The court do not in the case of Kendall say that public money could not be reached by mandamus. Mr. Justice Thompson, speaking for the court, says in the case of Kendall, that in the event a balance was found in favor of Stokes, "it could not have been drawn out of the Treasury without further legislative provision"—which is far from saying that if such legislative appropriation had been made, and the auditing officer had refused to pay, that a court could not compel the issuing of the warrant and thus reach public money through a mandamus.

Our conclusion is that a peremptory mandamus must issue.

HART, J.

In the matter of the application of Edmund C. Weeks for mandamus to the Comptroller for his salary as Lieutenant-

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Governor, the Comptroller answers, in substance, that Weeks is not such officer, and that the Governor had no authority to grant the commission; that another man claimed salary for the same office, and that the Senate, at the recent session of the Legislature, refused to recognize Mr. Weeks as its presiding officer.

Here is a conflict by a subordinate officer of the executive department against the action of its head, the Governor, who granted this commission. This application for mandamus is not, in my judgment, the proper legal proceeding provided in the system of government for ascertaining by what authority the holder of the commission claims the office. In this way, the Comptroller by refusing to act upon the quarterly requisitions by the officers for their salaries, might claim authority independent of the head of the department to which he belongs, or even of any other department, to decide and determine such questions. There is no such authority vested in that officer.

If any person desires to have such questions legally decided, the regularly established mode of doing so is always open to him. An attempt to procure the decision of such questions by setting them up outside of his department, and collaterally, tends to involve legal proceedings—correct legal remedies—in confusion and uncertainty, to the detriment of consistency in the administration of the law.

When the Hon. Davis S. Walker was Governor, he appointed a Comptroller. A committee of one branch of the Legislature was sent to inquire of him by what authority the appointee claimed the office. This was not the method provided by law for testing the matter, and the Governor correctly enough answered that he claimed it by authority of a commission which he had granted to him. The committee reported, and the matter ended there.

If the appointee was not legally appointed; if the Governor exceeded his authority, and violated the law in making the appointment, there was a mode provided by law for

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having it enquired into, and the claimant ousted. If questions of this kind are allowed to be tested in the manner attempted in this case, insubordination and confusion might follow, to the great embarrassment of government. A decision tending to oblige the Governor to obtain the opinion of the Comptroller upon the legality or illegality of an appointment by his commission before he could make it to be useful, could not be in harmony with the system of government established by the Constitution.

All the official acts of the Governor should be considered legal, respected and obeyed, until decided by the constitutional tribunal to be illegal.

The answer, that another man claimed salary for the same office, and that the Senate refused to allow Mr. Weeks to preside over it, sets up matter that might perhaps embarrass the minds of some Comptrollers; but this is not the tribunal for that officer to bring his doubts to in this manner for solution, since he cannot thus do so without conflict with and wholly ignoring the Governor of the State, the head of the department to which he belongs, and who is responsible for the faithful execution of the laws.

In my judgment, therefore, the enquiry into the legal authority of the Governor to grant the commission exhibited, and into the legality of the action of the Senate, and of Mr. Gleason's application for salary, ought not to be made in this case. That the reasons given by the Comptroller for his refusal to act upon the applicant's claim for salary, are in their nature collateral to the proper issue, irrelevant and insufficient; and that the peremptory writ should issue.

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THE STATE OF FLORIDA VS. JAMES W. JOHNSON, ATTACHMENT FOR CONTEMPT.

The Constitution of this State, (1868,) Article VI, Section 5, provides that "The Court shall have power to issue writs of mandamus, certiorari, prohibition, quo warranto, habeas corpus, and also all writs necessary or proper to the complete exercise of its appellate jurisdiction. Each of the Justices shall have power to issue writs of habeas corpus to any part of the State," &c.: *Held*,

1. That this is a general grant of power to use certain writs in the exercise of its jurisdiction, and that it is competent for the Legislature to prescribe the manner of obtaining and issuing process, and to provide that such process may be issued out of the Supreme Court in vacation as well as in term time; and the provisions of the Constitution do not repeal or invalidate acts of preceding Legislatures, authorizing Justices and Judges to allow supersedeas, writs of errors, and other process, and prescribing the effect of such process.
2. A supersedeas granted upon an appeal from an order allowing a preliminary injunction and appointing a receiver *pendente lite*, suspends the operation of the order and prohibits the further action of the receiver in carrying out the mandate of the order from which the appeal is taken.
3. When an appeal is taken and a supersedeas allowed from an order appointing a receiver, *pendente lite*, the power of the Court making the order and its officers is suspended in reference to the order appealed from, and the order remains inoperative pending the appeal. Any action or proceeding by any person under such order, in disregard and defiance of the force and effect of the supersedeas, after notice thereof or after service of a writ of supersedeas, is a contempt of the authority and jurisdiction of the appellate Court.

A statement of the case is contained in the opinion of the court.

Justice WESTCOTT, being disqualified, did not sit in this case.

S. J. Douglas, Papy & Peeler, for the State.

J. J. Finley and G. P. Raney for Respondent.

RANDALL, C. J., delivered the opinion of the court.

On the 11th day of August, 1869, James M. Baker and Wilkinson Call filed their bill in chancery in the Circuit

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Court of Leon county, against Franklin Dibble, Calvin B. Dibble, George W. Swepson, M. S. Littlefield, John P. Sanderson, Edward M. Cheney, Alonzo Huling, Silas L. Niblack, The Tallahassee Railroad Company, The Jacksonville, Pensacola and Mobile Railroad Company, and Harrison Reed, Governor of Florida, alleging certain matters concerning the purchase by the complainants and several of the defendants of the Pensacola and Georgia Railroad and the Tallahassee Railroad, and property and franchises of said Railroad Companies, which said railroads had been advertised and sold by the Trustees of the Internal Improvement Fund of the State of Florida.

On the 27th day of August, the Judge of the Second Circuit, on the petition of the complainants, made an order that said cause be transferred to the county of Columbia, in the Third Circuit, to be heard and determined before the Judge of that Circuit, and that the Clerk of Leon Circuit Court be required to forward the papers in said cause to the Clerk of the Circuit Court for Columbia county, together with a certified copy of said order. This order was filed by the Clerk of Leon county September 13, 1869.

On the 18th of September, 1869, the complainants presented a petition to the Hon. A. A. Knight, Judge of the Fourth Circuit, stating that the Hon. T. T. Long, Judge of the Third Circuit, was absent from the State, and asking that the Judge of the Fourth Circuit take said cause under consideration, and to grant such orders and decrees as he might deem proper, &c.

It does not appear that the papers in said cause were transferred to the Clerk of Columbia county, but that on the 18th of September the petition of complainants was filed with the Clerk of Duval county, and on the 20th September the bill was also filed in the office of said last named Clerk, and on the 20th September the Judge of the Fourth Circuit allowed an injunction, which was issued by the Clerk of Duval county.

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On the 21st of September complainants filed an amendment to the bill praying that a Receiver be immediately appointed; and on the same day said Judge appointed James W. Johnson as Receiver, and directed him to take possession of said railroads, and their properties, rights, credits, effects, trains, engines, equipments, receipts and money, and that said Receiver continue the running of the trains on said roads, and operate and manage the same efficiently and with economy, and regard to the safety of the public and their convenience; and further, "that said Receiver shall execute and perform the public trust and obligations created in the charter of said P. & G. R. R. Company, and in the agreement of the purchasers of the said railroad, in the extension of said railroad to the Chattahoochee river; and shall apply the net proceeds of the earnings of said railroad to the extension of said Pensacola and Georgia Railroad as located by said company." That said Receiver pay the expenses of operating said roads; that the officers, agents, and employees of said P. & G. R. R. Co., and of the Tallahassee R. R. Co., deliver all property, money, &c., of said roads to said Johnson, as Receiver; that said Receiver be vested with all necessary powers in the premises without further order; that he give bond in the sum of \$20,000 for the faithful performance of his duties; and that all contracts for the extension of said road be reported to said court for reference, examination, and approval by the masters of said court. Which said order was filed and entered by the Clerk of Duval county.

In pursuance of said order, the said Johnson, as Receiver, filed a bond, which was approved by said Judge and filed with said Clerk.

On the 12th of October, 1869, the defendants appealed from said orders to the Supreme Court, and presented to the Chief Justice the record in said cause and a petition accompanied with a bond in the sum of \$20,000, in due form, ap-

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proved by said Circuit Judge, asking that said appeal should operate as a supersedeas pursuant to law.

The Chief Justice "thought fit to order and direct" that said appeal should operate as a supersedeas and stay of proceedings, and that the Clerk issue the necessary process, to be directed to the Judge of the Fourth Circuit, and reciting also what to him seemed to be the effect of such supersedeas, and also that the process be directed to and served upon said Johnson, directing and informing him of his duty in the premises, as follows: "And you, the said James W. Johnson, Receiver, are hereby commanded that you restore and surrender the Tallahassee Railroad, called in said interlocutory decree and order the Pensacola and Georgia Railroad and the Tallahassee Railroad, and the moneys received by you from the operations of the same to the Tallahassee Railroad Company or to Franklin Dibble, the President thereof, or other proper officer of said company, except so far as you have paid out the same in operating said road or roads according to said interlocutory decree and order, and that you make such restitution, surrender, and return without delay."

(It appears that the Legislature at its late session, after the sale of the P. & G. and the Tallahassee Railroads by the Trustees of the Internal Improvement Fund, incorporated the purchasers, or some of them, with other persons, by the name of the "Tallahassee Railroad Company," the said purchasers being "F. Dibble and associates," as stated in the said bill of complaint, and also that said F. Dibble was the acting President of said Tallahassee Railroad Company.)

Afterwards, on the 21st day of October, 1869, at a term of the Supreme Court, it was made to appear to the court that notice of said appeal and order, in the form of a writ of supersedeas, had been served upon the Judge of the Fourth Circuit, and upon said Receiver Johnson, and that said Johnson, upon proper demand made, had refused to recognize the order and to comply with the terms, or with the legal effect thereof, by refusing to surrender the said railroad,

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property and effects, and that he persisted in acting as Receiver under the order which had been so suspended and made inoperative by said appeal and supersedeas, and by himself and his agents continued to demand the revenues and moneys earned by said railroads, all which actings were considered unlawful and in contempt and defiance of the jurisdiction and authority of this court, whereupon this court, in consideration of the premises, directed a writ of attachment to be issued against the said James W. Johnson, for the purpose of bringing him before the court to answer for the alleged contempt. The attachment having been issued, was afterwards returned by the sheriff with an endorsement by him, stating that he had arrested the said Johnson on the 23d day of October, and that Johnson had been taken out of his custody by means of a writ of *habeas corpus* issued by the Hon. A. A. Knight, Judge, &c., and discharged. Annexed to the return was a copy of the writ of *habeas corpus* and of the order of discharge attested by the Judge, but this court was not informed of the reason why such discharge was ordered. And forasmuch as this court did not perceive that said Johnson had been legally discharged by said Judge, or why the process of this court had been thus interrupted and set at naught; and because this court is the proper judge of its own jurisdiction, and of what writs and process it may lawfully issue in the exercise of its functions under the Constitution and laws; and denying that any other tribunal has been created which may lawfully prohibit the exercise of its ordinary jurisdiction, we saw fit to direct another writ of attachment to be issued against said James W. Johnson, requiring him to be brought before the court to answer the premises.

On the 3d day of December, 1869, the sheriff returned this writ of attachment served, and produced said Johnson before this court. On the 4th of December said Johnson, by his counsel, filed an answer in writing "acknowledging the authority of this court to inquire into, adjudge, and de-

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termine what is a contempt against its authority; but exercising the right of defense conferred upon him by the laws of the land, he says he has not been and is not guilty of the alleged contempt." And he further denies the authority of the Chief Justice of this court to grant a writ of supersedeas; and further denies the power of the Supreme Court, or a Justice thereof, to superadd to a writ of supersedeas an affirmative mandate which gives to said writ a retroactive operation, as is done in this case. That as a Receiver appointed by the court below, whose officer he was, the writ of supersedeas and the affirmative mandate thereto attached, could not legally reach him as such Receiver, except through the court by whom he was appointed and under whose orders he acted, and that he has never received any orders from that court commanding him to surrender the said property mentioned in the order appointing him; and prays to be discharged from said writ of attachment. And the counsel further stated to the court "that the respondent had not complied with the supersedeas and mandate of this court."

Hereupon the counsel who moved for the issuing of the writ of attachment objected to the consideration of all that part of the answer which sought to question the regularity of the issuing of the supersedeas and mandate of this court, and moved, upon the admission by the respondent that he had not complied with such process, that the respondent be committed to the jail of the county of Leon, until he shall purge himself of the contempt committed in disobeying such mandate, the said writ and mandate not having been set aside by the court in the cause wherein it was issued. And it was then and there announced by the court that this motion must be granted, and that the court would not consider in this proceeding the regularity of the proceedings under which such supersedeas was issued; but the counsel of the respondent desiring to be heard upon the question as to what degree of punishment ought to be inflicted upon the respondent, were allowed to do so, and to present to the

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court the several matters contained in his answer. And in view of the importance of this case, and of the actings of the said respondent in the premises, and of the public interest that has been excited in some portions of the State, (by means which may be considered somewhat extraordinary,) we proceed to present the whole matter as it appears to this court.

It has been suggested that a Justice of the Supreme Court cannot lawfully issue any writ except the *habeas corpus*. To which it may be answered that in this matter neither of the Justices has issued any writ whatever.

The Constitution says: The Supreme Court shall have appellate jurisdiction in all cases of equity. * * The court shall have power to issue writs of mandamus, certiorari, prohibition, quo warranto, habeas corpus, and also all writs necessary or proper to the complete exercise of its appellate jurisdiction. Each of the justices shall have power to issue writs of habeas corpus, &c.

If this general grant of power to issue the enumerated writs, and also all the writs necessary or proper to the exercise of appellate jurisdiction, sweeps away all the statutes regulating the practice of the court, so far as those statutes authorize any act to be done by a justice of the court, as a preliminary to the issuing or giving effect to any process of this court; and if it so circumscribes and defines the powers and duties of the justices, that any statute authorizing any order or act of one justice in any proceeding, (except the habeas corpus,) not expressed in the Constitution, is abrogated, it follows that no process can be issued out of the Supreme Court, except by its order in term.

If this is a correct view, then have the Justices of the Supreme Court of this State from its earliest organization been in the practice of making orders not warranted by the Constitutions under which they acted, and of acting upon orders and processes illegally issued.

The first Constitution (1838), Art. V, Sec. 2, says that

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the Supreme Court shall have appellate jurisdiction only, "provided that the said *Court* shall always have power to issue writs of injunction, mandamus, quo warranto, habeas corpus, and other such remedial and original writs as may be necessary to give it a general superintendence and control of other Courts." The Constitution of 1865 repeats this language *verbatim*. The language of the Constitution of 1868 is, as already shown, substantially the same.

The Legislature has in several instances provided the mode of issuing process out of the Supreme Court, and also provided the manner of obtaining a supersedeas. The act of February 10, 1832, Sec. 7, (Duval, 109), says: "All writs of error shall be tested in the name of the Chief Justice and shall issue *on demand* as a matter of right, from the office of the Clerk of the Supreme Court or from the clerk of the court in which such judgment has been rendered; but no writ of error shall operate as a supersedeas unless by the special order of the said court or some Judge thereof, made upon inspecting a copy of the record."

The act relating to appeals from final decrees, passed February 11, 1832, says: Every final decree shall be made and pronounced in open court, and the plaintiff or defendant may appeal from the said decree at any time within two years; provided, however, that the same shall not operate as a supercedeas unless the appeal be taken within the time fixed by law in other cases, or if not taken within that time, upon an *order* of one of the Judges of the Supreme Court *directing* the said appeal to operate as a supersedeas.

The act of 1847 relating to writs of error in criminal cases, sec. 3, says: That a party convicted of crime or misdemeanor not capital shall be entitled to a writ of error to the Supreme Court on the following terms: He shall obtain from the clerk a copy of the record of the case, duly certified, and cause the same, together with an assignment of error relied on for reversal of the judgment, to be presented to the Supreme Court, or to *one of the Justices* there-

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of, and if such Court or Justice shall be of opinion that there is just cause for allowing a writ of error, he shall so indorse on such record, and thereupon a writ of error shall issue from either the Circuit or Supreme Court.

The act of 1852, sec. 3, relating to appeals from interlocutory orders and decrees, contains the proviso, "that such appeals shall not operate as a supersedeas unless the Judge of the Circuit Court or a Justice of the Supreme Court, on inspection of the record, shall think fit to *order and direct* a stay of proceedings."

Before the passage of this act no appeal was allowed except from a final decree. The preamble to the section explains the reason of the enactment. It often happened that an interlocutory decree or order made important changes in the relation of parties and their property, and gave occasion for delay, and often of great expense, which decree or order may have been erroneous, whereby, after years of litigation, a final decree may have been set aside by the appellate court. The object of this statute of 1852 was to give parties a means of correcting such errors without the great sacrifices and inconveniences arising from the postponement of an appeal until a final decree. This act provides for the supersedeas upon terms similar to those required in case of a final decree, to-wit: The giving of adequate security and the order of one of the Justices directing the appeal so to operate.

It has been the very general practice, as appears upon an inspection of the records of the Supreme Court of this State, when writs of error or a supersedeas have been desired, that they have been issued or allowed under these statutes, upon the order and direction of a justice of this court.

As we have shown, the constitutional provisions on the subject have not been changed from the first. Provisions, identical with our own, are contained in the Constitutions of many of the States—for instance, of Alabama, California,

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Iowa, Michigan, Wisconsin, Nevada—in respect to the issuing of process by their appellate courts, and the statutes made under them contain provisions that certain writs are to be allowed and their effect determined by the order of a Judge or Justice of the appellate court upon inspection of the record; the language used being generally like that of our statute. In only two or three of the States do their Constitutions *expressly* authorize one of the Justices to make such orders. In nearly all the States the justices are authorized by statute to approve bonds, administer oaths, &c., as preliminaries to the issuing of process; and the judges and justices of the different States are in the practice, under such statutes, of doing precisely what the Justices of the Supreme Court of Florida have always practiced. The practice having so long been established in this State, it is presumed that if the framers of the Constitution of 1868 had intended to change or prohibit it, they would have so indicated, otherwise it may be presumed that they intended to acquiesce in the construction uniformly given.

The Constitution also provides that the circuit *courts* and the *judges* thereof shall have power to issue all writs proper and necessary to the complete exercise of their jurisdiction; and who will say that because the power to issue writs is given thus to the court or judge, therefore the clerk may not be authorized by law to issue the writ of summons or subpoena, with or without the action of the court or judge, for the purpose of commencing a suit or procuring the attendance of witnesses? Yet, it will be observed, the language used, conferring upon the circuit courts the "power to issue" process, is identical with that used in conferring the power upon this Court to issue all writs deemed necessary or proper to the "complete exercise of its jurisdiction."

Indeed it would be strange, (the appellate court not being always in session, the Constitution contemplating vacations and fixing the time of holding the terms,) that under a provision that the court may issue certain writs necessary to

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give them control over the proceedings of other courts, it should be held that the Legislature could not regulate the practice therein and authorize the issuing of writs out of such courts, and give them certain effect, upon the order of one or more of the justices or of a circuit judge, or in such other manner and on such terms as might be deemed proper for the furtherance of justice. That is very certainly and very properly within the province of the Legislature, like other matters of practice which are generally regulated by statutes. Otherwise parties might be deprived of the benefit of an appeal or writ of error until the happening of an annual term of the court, and meantime suffer irreparable injury. Neither life nor property nor reputation would be safe from the effects of the errors and blunders which sometimes creep into the proceedings of courts.

The order of the justice or judge is in no sense a determination of any question involved in the case, but only that the appeal or writ of error is not apparently frivolous, and that the security given is sufficient to protect parties against the effect of suspending the operation of the order, judgment or decree appealed from, and that proceedings thereunder ought to cease until the cause can be heard before the court. And we can scarcely conceive it possible that all such statutes, and such practice of the appellate courts of the country, have been really unconstitutional and void, the judge and justices deserving of censure for acting under them, and that the discovery thereof has been postponed until the present occasion. If so, the bar of the State and all the preceding Legislatures must bear their share of the odium.

We are of the opinion, however, that the statutes referred to are valid, that they are not abrogated, and that the supersedeas was properly allowed in the case out of which this matter has grown; the inhibitory process issued "being matter of form, in pursuance of the suspending nature of the appeal."

The inquiry next arises: What is the effect of a super-

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sedeas in cases of appeal from the interlocutory orders granting an injunction and appointing a receiver?

These orders were made by the circuit judge at Chambers and without notice. With the regularity of these proceedings we have now nothing to do. The law points out the means by which the opposing party may be relieved of the operation of interlocutory orders, viz: by an appeal and giving security to indemnify the party in whose behalf the orders were made, and thereupon obtaining the order of a circuit judge or one of the justices of this court. The object of the security is to indemnify the party against the consequences of the suspension of the order appealed from. The security stands in the place of the action of the receiver until the matter can be heard and determined upon the appeal in this court.

Authorities directly in point are few, owing to the fact that in most of the States appeals have not been allowed from interlocutory orders. We will refer however to cases more or less analogous in principle.

In the case of Boyle vs. Zacharie and Turner, 6 Peters, 648, cited by counsel for respondent, a judgment had been obtained in the district of Maryland. A *fiery facias* was issued and levied in March, and in April a bill was filed to stay proceedings at law upon the judgment, and an injunction was granted. In August a writ of *venditioni exponas* was issued to the marshal, who in December term made return that he had received the amount of the execution from the defendant, and had it ready to bring into court. The defendant at the same term moved to quash the writ of *venditioni exponas* for causes stated, and "that according to the uniform and immemorial usage in the State of Maryland with regard to the State courts, whenever a writ of *fiery facias* had been levied, and the proceedings had been stayed by injunction before the sale, the officer who had the writ of *fiery facias*, delivered up the property seized to the defendant at law, upon the service upon the said officer of notice of the

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writ of injunction." The court say: "The very ground of argument to maintain the motion to quash is, that the injunction operated as a supersedeas of the execution, according to the acts of Maryland regulating proceedings in Chancery and injunctions, which give to an injunction the *effect of a supersedeas at law*. But the acts of Maryland regulating the proceedings on injunctions and other chancery proceedings, and giving certain effects to them in courts of law, are of no force in relation to the Courts of the United States."

** "Nothing is better settled at the common law than the doctrine that a supersedeas, in order to stay proceedings on an execution, must come before there is a levy made under an execution, for if it comes afterwards, the sheriff is at liberty to proceed upon a writ of venditioni exponas to sell the goods." A number of English and American authorities are cited in support of this rule of the common law, most of which authorities are cited in Tidd's Pr., 1072-3. And by referring to Tidd, it will be seen that this is the rule *where no bail is put in*, as will be presently noticed.

In the case of Hardeman vs. Anderson, 4 How., 640, also cited by the counsel for respondent, a writ of error had been issued and afterwards dismissed, whereby the party lost the benefit of a supersedeas, and another writ of error was sued out, whereupon an application was made to the Supreme Court that a writ of supersedeas be awarded, and the court awarded it "under the general powers of the court," and the court entered this order: "Whereupon it is now considered and ordered by this court, that a writ of supersedeas be and the same is hereby awarded, commanding the judges of the circuit court of the United States for the Southern District of Mississippi to stay any execution or proceedings on the judgment of the said circuit court in this case pending this writ of error, and also command the marshal of the United States for the said district, that from every and all proceedings on execution or in anywise molesting the plaintiffs in

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error on account of the said judgment, he entirely surcease, *the same being superseded.*"

The distinction is this, that the Supreme Court of the United States in virtue of *its general powers* directed a *supersedeas*, whereas our statute in reference to appeals in chancery provides that a *supersedeas* may be ordered by a judge of the circuit court or a justice of this court on security being given.

Where an appeal is rightfully made, the judgment from which the appeal is taken becomes wholly inoperative. *Penhallow vs. Doane*, 3 Dallas, 87; *Keen vs. Turner*, 13 Mass., 266; *Yeaton vs. U. S.*, 5 Cranch, 281; *Wade vs. The Colonization Society*, 4 Sm. & Mar., 671; *Helm vs. Boone*, 6 J. J. Mar., 351.

While an appeal is pending, every proceeding under the original judgment is void. *Thompson vs. Thompson, Cox*, N. J., 159; *Tidd's Pr.*, 337.

On taking an appeal from a final judgment, and obtaining a *supersedeas*, a sheriff is bound to release a levy under an execution issued upon the judgment. *Rucker vs. Harrison*, 6 Mumford, 181.

The appeal was a *supersedeas*, and the appellee having afterwards proceeded upon the execution already issued, the opposite party had a right to call upon the court to restrain him by a rule. *Sholts vs. Judges of Yates*, 2 Cow., 506.

In *Walker vs. McDonnell*, 4 Sm. & Mar., 118, the court said, the practice had always been in that State, on a *supersedeas* after levy, to return the property to the defendant.

In the case of the *Lessee of Brisbee vs. Hall*, 3 Ohio, 449, where an injunction was issued staying proceedings on an execution, the court say: It was lawful for the sheriff, upon service of the injunction, to re-deliver the goods to the owner. The injunction bond was substituted for the plaintiff's security.

In *Eldridge vs. Chambers*, 8 B. Monroe, 411, the court says: When an officer returns an execution levied, and

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stopped or stayed by injunction or supersedeas, the return imports a cessation of the levy and a release of the property.

In *Conway vs. Jett*, 3 Yerger, 481, the practice is recognized, that where an execution is enjoined after levy, and security given, the property is to be returned to the debtor.

In *Hudson vs. Smith*, 9 Wis., 122, the court say: the very idea and object of an appeal seem entirely repugnant to the idea that the party, notwithstanding the appeal, may go on in the court below and *execute the judgment or order appealed from*.

After a writ of error was allowed, the sheriff having levied, and *no bail* having been put in, the court held, upon that ground, that the writ of error was no supersedeas or stay of execution, but if the writ of error had been followed by putting in bail, it would have operated as a supersedeas. *Tidd's Pr.*, 1073; 2 T. R., 45.

The case of *Archer vs. Hart & Sammis*, 5 Fla., 234, arose when the law provided that thirty days should elapse after the pronouncing of a final decree before it should be engrossed and signed. The court say: "If the execution of the decree had been commenced, the supersedeas would arrest the proceedings at the stage in which they were when the supersedeas was allowed. * * * If the party had suffered the time to have passed, and the execution of the decree had been *consummated* by the discharge of the boy Dennis and the cancellation of the bond, (pursuant to the terms of the final decree,) and he then had prayed an appeal and obtained an order for a supersedeas, *such* order would not have retroacted so as to make void what had been done in executing the decree."

This is upon the familiar general principle, that whenever rights have become vested in pursuance of a final judgment or decree, (as by the purchase of property, being fully executed,) before any steps have been taken to reverse such judgment or decree, they will not be disturbed, though the judgment or decree may be subsequently reversed.

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The allowance of a supersedeas does not, nor does the order in this case “undo” or reverse the order of the circuit judge. The order, following the intent and effect of the law, in terms directs a stay of all proceedings under the several orders appealed from, and suspends their operation. The power of the circuit court was suspended, and thereby the power of all the officers in that court, under its orders in question, became inoperative. They no longer had any duties to perform under such orders. The authority of the receiver to continue to act as such, was made nugatory by the operation of the law. He had entered upon an office and commenced to act, when the office was suspended. The supersedeas as understood by us, and as seems to be understood by the courts, does of necessity retroact by suspending the life of the order appealed from; reaches back to that order and forbids action under it.

It does not make *unlawful* an act done in pursuance of the order before the appeal was taken, but it forbids the court and its officers further to act. No new rights having been created, and the duties of the receiver being superseded, the bond standing in the place of the property in his hands, and he having been notified thereof by proper process, it was his duty to restore that which had come to his hands, to the parties from whom it had been taken and withheld; for his authority to take, being inoperative by the suspension, his authority to hold was equally so, both being derived from the same order.

We have seen that the effect of a supersedeas, upon a final decree, depended upon what had been done in pursuance of it. A final decree is supposed to be pronounced with deliberation, upon competent proofs and with due notice to parties. Hence new rights, duties and interests may be created which become fixed and irrevocable; but it is not so of an interlocutory order, made at the outset, and perhaps before the parties having large interests at stake are summoned, or even before they suspect the attack of the complaining party.

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From the proceedings in the case it was impossible that any new interests could have been created.

Let us inquire whether, from the nature of the case, there could be any doubt as to the effect of the stay of proceedings and the duty of the receiver, even though it had not been plainly pointed out to him in the formal mode pursued. For the process served was a notice of the supersedeas and of its legitimate effect; or, as Mr. Justice Cushing remarks in *Penhallow vs. Doane*, "the inhibitory part is rather matter of form, or *in pursuance of the suspending nature of the appeal*, and as a further guard and caution." Here the order appointing the receiver is suspended by the force of the law. That order, as before recited, directed him to take possession of certain railroads, to operate the same, to receive their revenues, to pay their expenses, to construct a railroad (in pursuance of an alleged contract,) out of the earnings to be received. Now, when the powers of the circuit court and the duties of its officers under the superseded order were suspended, what was the effect of the suspension? It seems to us that it was legally and logically this: the court and its officers are required to surcease and desist from taking and holding the railroads, their property and moneys; stop operating the same; stop receiving the revenues; paying expenses; building railroads out of the revenues; make no contracts; leave the roads as you found them until the determination of the matter by the court having cognizance of it.

The appellants gave a bond which was approved by the circuit judge and by a justice of this court. It was given in accordance with the requirements of law, and to the end that their appeal should operate as a supersedeas. Is it true that an order may be appealed from and a supersedeas allowed, and yet that the order retains its life and force because it had been issued and served before the defendants could perfect their appeal? If so, of what avail and to what end is a stay of proceedings, and what is stayed? Did the

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law require this large security merely that the taking an appeal might be rendered inconvenient, or rather that some substantial purpose might be subserved, corresponding with the evident object of the statute? If the *effect* of the order appealed from be not reached, why has the Legislature provided that the supersedeas may be allowed?

The power of the circuit court over the matter being suspended, to what tribunal is the receiver amenable, if he must needs continue to act as though no appeal had been taken? If any part of the order appealed from be suspended, what part? and who shall determine how far he may act, and when to cease?

It is no answer that the receiver has given security for the performance of the duties required by the order appointing him, and that such bond obliges him to obey the circuit court. The bond enures to the benefit of the parties appealing, as well as to others; and he is amenable to the court having authority for the time being, in the due course of law. We fail to perceive how he is to be damnified, if, pursuant to law, the property be returned to the parties entitled, the appellants having given security for the protection of all other parties. There is little danger that courts will not protect officers or persons who act according to law and in obedience to their orders.

But what is the effect of the action of the receiver in refusing to comply with the law? He had no longer any authority or right, as such, to operate railroads, or to build railroads, or to pay their expenses, or to receive their revenues, or to hold railroad property, because his powers, under the order appointing him, are suspended; yet he refuses to recognize his lawful duty when plainly pointed out to him, refuses to return the property and effects, and thereby the parties previously in possession are prevented from taking and operating the roads, or paying their expenses out of the revenues. The receiver having no authority further to operate the roads, and refusing to allow the *prima facie* owners

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so to do, the necessary result is that the roads must cease their operations and business, the engines and cars must rest quietly upon the track, and the operatives be discharged, until the appeal be disposed of. Not only the parties directly interested in the roads, but the public, who are much more interested, must suffer under this state of affairs.

The appeal gave to this court the control of the matter appealed, under the Constitution and the laws, and the effect of the appeal is the law of this court as well as the law of the circuit court and its officers and agents. The order staying proceedings does not discharge the receiver, but suspends him and all his powers and duties as an officer of the circuit court. The order is, of necessity, a mandate to that court, and its effect is a prohibition; (5 Dane's Abr. Ch. 138, Art. 7,) otherwise it is an idle ceremony.

If it has not the qualities we have ascribed to it, of what possible avail is it? Merely prohibiting the court from further action, under the order appealed from, is nothing. That the Receiver shall remain with full powers after his authority is suspended, or that an officer of the court may proceed to execute a decree after an appeal and a stay of proceedings under the decree, are propositions which we think cannot be maintained.

It is inherent in the nature of judicial authority that every court may protect and maintain its jurisdiction under the law, and that it shall protect itself against all attempts to resist, or thwart, or overthrow its authority. Without the power to judge of its jurisdiction, it is practically without jurisdiction. Without the power to enforce its judgments, it has no judicial authority. That it be made the plaything of whosoever may choose to deride its judgments or its process, and ignore its existence and its acts, because the opinions of the Judges and the judgments of the court may not meet the approval of counsel upon the one side or the other of a controversy, or may not be in accordance with the opinions or the wishes of subordinate officers, cannot be allowed

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without surrendering the judicial character and confessing the impotency of this department of the government. Courts commit errors, and parties may suffer from the improvidence or corruption of their Judges, yet the remedy for these is not in individual resistance or in a resort to private judgment. Every court will hear the appeals of those who conceive themselves to be wronged or threatened with injustice by the execution of its decrees. If its errors be made apparent, it will do justice to itself by dealing justice to parties without fear and without hesitation. There is no excuse for resistance of the orders of the courts in this country where their doors are wide open, and where every human being may be heard in the presence of the whole people.

In the case before us, we regret to conclude that the respondent is without lawful excuse for his disregard of duty, of the authority of this court, and of the law of the case, and he is therefore adjudged to be in contempt, and that his misconduct aforesaid was and is calculated to impair and impede the course of justice, and to prejudice the rights of the appellants in the cause referred to.

It is thereupon ordered and adjudged by the court, that the said James W. Johnson stand committed to the jail of the county of Leon, without bail, until he shall fully purge himself of the said contempt by restoring or surrendering to the Tallahassee Railroad Company, or to Franklin Dibble, the President thereof, or other proper officer of said company, the said Tallahassee Railroad, (otherwise called the Pensacola and Georgia Railroad and the Tallahassee Railroad,) and the moneys received by said James W. Johnson, as Receiver, except so far as he has paid out the same in operating the said road or roads according to the interlocutory decree or order of the Circuit Court of Duval county appointing him as such Receiver, and until the further order of this court in the premises.

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HART, J., delivered the following concurring opinion :

Concurring in the opinion just delivered, I desire to state, though it may be nothing new, the subjects being all so ably treated by the Chief Justice; that I do not understand the Constitution as abrogating the statute which authorized one of the Justices of this Court to order stay of proceedings in case of an appeal from an interlocutory order of the Circuit Court.

In the system of governments, provided for by the Constitution of the United States, when a new State Constitution is made, it is to be construed and understood as being made in reference to and in approval of long existing statutes, unless it expressly annuls or changes them.

The making the order for a stay of proceedings as specific and comprehensive as the nature and circumstances of the case seem to require, is a necessary consequence of the present statutory authority to make the order.

In a proceeding like this, very carefully and guardedly authorized by statute, the *order* is for the purpose of having the appeal from the interlocutory order of the Circuit Court operate as a supersedeas.

The orders granting preliminary injunctions and appointing Receivers, made by the Circuit Courts, are interlocutory orders.

A supersedeas in a case like this is not simply a dead-lock and nothing more—great would be the injury to enterprise and scandal to the law if it were. It is a living operative authority intended to accomplish some good end in the case to which it applied. It necessarily supersedes the operation of the interlocutory order appealed from in all its stages and restores the thing operated upon, or else it is a mockery, and the statute authorizing it never had any of the effect which it was intended to have. An appeal taken from a final decree in a certain time and manner prescribed by law, is a supersedeas without any order of any Judge to make it

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so; but, being taken from a final decree, of course can, as a supersedeas, accomplish little more than to stay execution; but taken from an interlocutory order, is not and should not be in all cases necessarily so confined or limited. The whole benefit and primary object of the statute of 1852 would entirely fail under such a limiting construction.

The order for a stay of proceedings may be extensive enough to reach and affect all the proceedings affecting those appealed from, and the precept or process in pursuance of the order may be issued from the office of the Clerk of the Court, where the Justice making the order sits as Judge, under the seal of the court, for this course secures the enforcing of the statute. When he so orders, and it issues out of the Clerk's office with the seal of the court attached, it becomes the process or writ of the court, and as such must be respected and obeyed. If there is any error in it, disobedience or defiance is not the proper way to correct the error. No officer of this or of the Circuit Court whose acts it purports to control or direct, can with impunity disregard or disobey its commands.

If this court corruptly errs, the Legislature that represents the highest power, the people, who have prescribed what their Legislature as well as their courts may do, may apply the corrective.

The only question now here is, Has the writ of supersedeas been obeyed? The Receiver answers substantially that he is not guilty of contempt in not obeying it, because he says that the writ was not ordered and issued by lawful authority. This is no answer, except as an avowal of disregard, and coming from a subordinate officer of the Circuit Court is, to say the least, very improper.

Whether that writ is regular or not, is no concern of his any more than the validity of an order would be to a master or of any writ to a sheriff. It concerns the party to the suit, who has had abundant time and opportunity to raise that question before this court by motion, and has not done

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so. The Receiver admits that he has not obeyed the writ, and presents a question which for him is out of place, and which is no excuse. Thus the affidavit of non-obedience, upon which the attachment was ordered, is fully sustained and proved of record to be true. There is nothing left for this court to do but to punish the contempt of its process and enforce obedience thereto, or else continue to be contemned and despised. There is no cause or reason for even some leniency. This is the first time in the history of Florida that the process of this tribunal has been by an officer of a court intentionally disregarded and the act deliberately avowed by him in open court. It is to be hoped that it will be the last. Whatever some men may choose to think of others as men, the *tribunal* must be everywhere respected by at least implicit obedience to its process. Without this, the fabric of jurisprudence, erected by the experience of ages, the best constituted safe-guard of human rights, must fall. Great, beneficial and beautiful as it is, it is a delicate structure, and cannot maintain its usefulness under frequent shocks of disrespect. It has its enemies, as is patent in this case, so also has everything that is beautiful and good.

THE STATE OF FLORIDA *ex rel.* WILLIAM D. BLOXHAM VS.
JONATHAN C. GIBBS, SECRETARY OF STATE, *et al.*

1. This Court has the power to grant a writ of mandamus directing the Board of State Canvassers to re-assemble and complete a canvass of the returns of votes cast at a State election where they have neglected to make a complete canvass of the returns in their possession.
2. The object of the law creating a Board of Canvassers of election returns is to ascertain from the returns the whole number of votes cast,

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and to determine therefrom and certify the result of the election. They are required by law to meet at a given day for this purpose, and may adjourn from day to day until their duties are completed; and in case legal returns are received by them at any time before they complete the canvass, which would have been counted if received by the day appointed by law, it is their duty to include them in the canvass and certificate, and if they refuse, they may be required by the writ of mandamus to complete the canvass of all the returns received, and to certify the result according to law.

1. A peremptory mandamus will not be granted upon the return of an alternative writ, unless the respondents may be required to do all that is required by the alternative writ, and therefore where the alternative writ required all the members of a Board of Canvassers to canvass the returns and declare the result of an election, and after that, that one of them in another official capacity should record the proceedings of the Board, and issue a certificate thereon, the peremptory writ was refused: for, until an officer shall have neglected or refused to perform a duty, he cannot be proceeded against by this writ, and the officer who may be required to give a certificate of the proceedings of a Board cannot be so required until the Board shall have acted.
4. An alternative writ of mandamus may be amended.
5. An injunction, restraining a Board of Canvassers from proceeding to canvass and certify the result of an election until the further order of the Judge granting the same, where the statute requires the Board to proceed by a certain day, is unauthorized.
6. Pending the proceedings by mandamus against a Board of Canvassers, the Legislature repealed the law creating such Board, without saving proceedings or duties required by law to be performed by them and uncompleted: *Held*, That the power of the Board to proceed was gone, and therefore the proceedings against them were dismissed.

MANDAMUS.

Upon petition filed by William D. Bloxham; on the 10th day of January, A. D. 1871, an alternative writ of mandamus to the Secretary of State, Comptroller, and Attorney General of the State, members of the Board of Canvassers of general elections in Florida, was awarded. The alternative writ, which states the case made by the petition of the relator, is as follows:

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The State of Florida to Jonathan C. Gibbs, Secretary of State, Sherman Conant, Attorney General, and Robert H. Gamble, Comptroller, Members of the Board of Canvassers of Florida, and to every of them—Greeting:

Whereas, it has been suggested to us that an election was held in the several counties of this State on the 8th day of November last, for the election of one Representative in Congress, of a Lieutenant-Governor of the State, and of Senators and Members of the Assembly of the Legislature of Florida, said election being held in pursuance of law and of Executive proclamation; and that at the said election William D. Bloxham, who was and is by the Constitution of this State eligible to and qualified to hold the said office of Lieutenant-Governor, was a candidate to be voted for by the voters of this State to fill said office; and that besides himself, one Samuel T. Day, was also at said election a candidate for said office; and that other than the said Bloxham and the said Day, there was and were no candidate or candidates for the same.

That by the returns of the said election received at the office of the Secretary of State, and now on file in said office, the whole number of votes cast at the said election for the said Bloxham, was thirteen thousand four hundred and sixty-two (13,462) votes, and the whole number of votes cast for the said Day, was thirteen thousand three hundred and ninety-eight (13,398) votes.

That on the 29th day of November last, Jonathan C. Gibbs, Secretary of State, Almon R. Meek, then Attorney General, and Robert H. Gamble, Comptroller, met and organized in the office of the said Secretary as a Board of Canvassers of the State, to canvass the elections returns from the several counties of the State, and determine who had been elected by the highest number of votes, as shown by the said returns, to the several officers above mentioned.

That it then and there appeared from the statements of

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the said Gibbs, Secretary of State aforesaid, that no election returns had been received from divers of the counties of the State up to that time. That among the counties from which the said Gibbs then reported that no election returns had then been received at the office of the said Secretary, were the counties of Brevard, Dade, Manatee and Monroe. That the time given by law for the reception of the election returns from the said counties above mentioned had not elapsed at the time of the meeting of the said Board. That a majority of the votes, in the aggregate, of the said counties had been cast for the said Bloxham; and that he had reason to believe, and did believe, that by the time limited in law for the forwarding and reception of the returns at the Secretary of State's office, of the returns from the said counties above named, the returns from all the other counties reported by the said Gibbs, as not having been then received, could be and would be forwarded to and received at the said office of the Secretary of State. That the returns from the counties, whose returns the said Gibbs then reported to said Board had not been received, were necessary for an authentic determination of the result of the said election. That in the absence of these returns, the relator had reason to believe it would be made to appear by the said Board of Canvassers that a majority of the votes cast by the qualified voters of the State, at the said election, had been cast for the said Day, whereas, in truth and in fact, as the relator had reason to believe, and did and doth believe, a majority of said votes were cast for himself.

That a major portion of the members of said Board of Canvassers did then and there show what the relator believed to be a manifest purpose and determination to proceed forthwith to complete, conclude and finish their said canvass, without waiting, as it was their duty to do, for the forwarding and reception of the said election returns from the said counties of Brevard, Dade, Manatee and Monroe; and without waiting for the returns from the counties of

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Calhoun, Lafayette, Sumter, Suwannee and Taylor, from which last mentioned counties the returns had not then been received, or if received, were alleged by the major part of said Board to be in such wise informal and defective as to leave no doubt on the mind of the relator that they would be rejected by the said majority of said Board; and that the said Board, or the major portion of them, as the result of their canvass, would, to the manifest wrong of the relator and of the people of the State of Florida, as he verily believed, determine and declare that the said Day and not the relator had been at the said election elected to the office of Lieutenant-Governor.

That to prevent this alleged wrong and outrage, the relator did then, on complaint filed before the Judge of the Second Judicial Circuit of the State of Florida, setting forth the foregoing facts and others, obtained from said Judge an order for an injunction to restrain the said Board of Canvassers, the said Gibbs, Meek and Gamble, from concluding the said canvass, and declaring the result of the canvass of the election returns until the further order of the said court.

That the said order of injunction was served upon the said Board of Canvassers, and upon each of its members, on the 30th day of November last. That within a few days thereafter, the said Board adjourned until the 26th day of December then next ensuing said adjournment. That about the day of said adjournment, the said Almon Meek resigned the office of Attorney General, and thereupon one Sherman Conant was appointed to fill the vacancy in the office of Attorney General, and the said Sherman Conant having accepted said appointment, and having qualified as Attorney General, became, in pursuance of statute in such case made and provided, a member of said State Board of Canvassers.

That the said Board, consisting of the said Jonathan C. Gibbs, Secretary of State, Sherman Conant, Attorney General, and Robert H. Gamble, Comptroller, did again meet as such Board in the office of the Secretary of State, on the 27th

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day of December last, with the avowed object of resuming the canvass of the said election returns. That the major part of the said Board, to-wit : the said Gibbs, Secretary of State, and the said Conant, Attorney General, did then and there, as said relator was informed and believes and alleges, in defiance and contempt of said order of injunction, resolve and decide forthwith to conclude and finish the said canvass, and determine and declare the result of the said election. That in furtherance and execution of this their resolve and purpose, as the relator was informed and believes and alleges, and for the execution of the same, they, the said Gibbs and the said Conant, withdrew from the said office chamber and office room of the Secretary of State, where by law the board of canvassers are required to make their canvass, leaving the said Gamble in the said office of the Secretary of State, and did go into the office room of the Governor of the State, and there, apart from the said Gamble, did conclude and finish their said pretended canvass, and did, there and then, cast up and add together such election returns as suited their pleasure, and that the returns so canvassed and counted and cast up by them, the said Gibbs and the said Conant, were returns found in the office of the Governor of the State, and not the returns on file in the office of the Secretary of State. That they, the said Gibbs and the said Conant, having concluded and finished their said pretended count and canvass as aforesaid, in the office of the Governor, did make and prepare and sign, in the said Executive office, and in the absence of the said Gamble, a pretended certificate of the result of the said canvass and count, which having made, prepared and signed, they returned with the same to the office of the Secretary of State, and there presented to the said Gamble for his signature, who refused to sign the same.

That there were then there present, on file in the office of the Secretary of State, the election returns of the election aforesaid from all and every of the several counties of

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this State. That the said Board of Canvassers, in violation of law, and in disregard of their duty, did then and there refuse to count and cast up the election returns from the following counties, to-wit: Brevard, Calhoun, Dade, Lafayette, Manatee, Monroe, Sumter, Suwannee and Taylor, to the great wrong and injury of the relator. That it appears by the returns from said counties on file in said office, there were cast in the said counties at the said election the whole number of two thousand five hundred and eighty-two (2,582) votes; and of these the number of sixteen hundred and thirty (1,630) votes were cast for the said Bloxham, and the number of nine hundred and fifty-two (952) votes were cast for said Day, showing a majority of six hundred and seventy-eight (678) votes cast in said counties for the said Bloxham over the number cast for the said Day.

That the said Bloxham having been informed on or about the 28th day of December last that the election returns of said election had then been received by the Secretary of State from all and every of the counties of the State, he on that day moved the Judge of the said 2d Judicial Circuit for the dissolution of the aforesaid injunction, which motion was then granted, and said order of injunction dissolved. That upon the dissolution of the said order of injunction, it was the duty of the said Board of Canvassers to convene as such Board of State Canvassers and to finish and conclude the said canvass and count, and to canvass and count the election returns of said election from all the several counties of the State on file in said office, and to determine who had been elected by the highest number of votes to the said office of Lieutenant Governor, as shown by the said returns, which said duty you, the said Gibbs, Conant and Gamble, as such Board, have failed to discharge.

That on the 2d day of the present month, the said Wm. D. Bloxham caused to be served upon the said Jonathan C. Gibbs, Secretary of State, Sherman Conant, Attorney General, and Robert H. Gamble, Comptroller, formal notice of

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the dissolution of the said order of injunction, and did then ask, request and demand of the said Gibbs, and the said Conant, and the said Gamble, that they do again meet and convene as a Board of State Canvassers, and that as such Board they do conclude and complete the canvass of said election returns, and that they do canvass and count the election returns from each and every of the counties of the State for the said office of Lieutenant Governor, and especially that they do canvass and count the election returns for said office for the counties of Brevard, Dade, Calhoun, Lafayette, Manatee, Monroe, Sumter, Suwannee and Taylor, and that they do determine who has been elected by the highest number of votes to the said office of Lieutenant Governor as shown by the said returns, and that they do make and sign the certificate required of them by law in such case. That notwithstanding the said Board were notified as aforesaid of the dissolution of the said injunction, and were required and called upon as aforesaid, by the said Bloxham, to conclude and finish the said canvass, and perform the duties in and about the same required by law, they have utterly failed and refused so to do, and show a manifest purpose and determination to persist in their failure and refusal. That they have full power and authority to reconvene as such Board and discharge said duties.

That in the said pretended canvass and count of said election returns made by the said Gibbs and the said Conant on the 28th day of December aforesaid, they refused to canvass and count the votes from said counties of Brevard, Calhoun, Dade, Lafayette, Manatee, Monroe, Sumter, Suwannee and Taylor, and by rejecting from the count the returns from said counties they made it appear that a majority of the votes cast at said election for said office of Lieutenant Governor were cast for the said Day, whereas had all the votes and election returns then on file in the office of the Secretary of State from all the several counties of the State been canvassed and counted, as they should

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have been, it would manifestly have appeared that the relator, the said Bloxham, had been elected to the said office of Lieutenant Governor as shown by the said returns. That the said Gibbs and the said Conant, being a majority of the said Board, having made, prepared and signed the aforesaid pretended certificate as above set forth, the same was recorded in the office of the Secretary of State, and a certified copy thereof was by the said Secretary caused to be published in one of the newspapers printed at the seat of government, and the said Secretary did, at some subsequent time, make and transmit to the said Day a pretended certificate, pretending to show the number of votes cast at said election for each person voted for thereat for said office of Lieutenant Governor, and that said Day holds and claims said certificate as prima facie evidence of his election to said office.

That all the actings and doings of said Gibbs and said Conant, a majority of said Board, in assuming, undertaking and pretending to conclude and finish the canvass of the election returns for said office of Lieutenant Governor, and in making out and signing the said certificate so made out, prepared and signed by them as aforesaid; and of the said Gibbs, Secretary of State, in causing a certified copy of said certificate to be published as aforesaid, and in making out and transmitting a certificate to the said Day as aforesaid, were done in defiance and contempt of said injunction, and were therefore null and void, and were done not in the manner required by the laws and statutes of this State, but contrary thereto, as above set forth, and were consequently null and void and of no effect whatsoever.

That the said canvass and count by the said Gibbs, Secretary of State, and the said Conant, Attorney General, was illegal in this: that it was done and made not in the office of the Secretary of State, but in the office of the Governor of the State; that it was illegal in this: that it was done by the said Gibbs and the said Conant, separate and

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apart from the said Gamble, the said Gamble being all the while in the office of the Secretary of State and being there in his character as a member of the said Board and not assenting to the separate action of the said Gibbs and Conant, but protesting that they had no right to canvass and count the election returns found in the office of the Governor of the State, but should count and canvass the returns on file in the office of the Secretary of State. That it was illegal in this: that the said Gibbs and the said Conant refused to canvass and count the election returns from the counties of Brevard, Calhoun, Dade, Lafayette, Manatee, Monroe, Sumter, Suwannee and Taylor, although the said returns were then on file in the said office of the Secretary of State.

That in contemplation of law there has been no canvass by you, the Secretary of State, and by you, the Attorney General, and by you, the Comptroller, nor by any two of you, of the election returns of the election held on the 8th day of November last for the said office of Lieutenant Governor, received from the several counties of this State.

That by the returns of the election aforesaid from the several counties of this State, on file in the office of the Secretary of State, it appears that the whole number of votes cast for the said Bloxham, as shown by the said returns in the office of the Secretary of State, were thirteen thousand four hundred and sixty-two (13,462) votes; and the whole number of votes cast for the said Day as shown by the said returns, were thirteen thousand three hundred and ninety-eight (13,398) votes. That the said Bloxham received a majority of the votes cast at the said election, as shown by the said returns, of sixty-four votes over the number of votes cast for the said Day; and that he, the said Bloxham, hath a right to be determined and declared by the said Board of Canvassers to have been elected by the highest number of votes cast at the said election for Lieutenant-Governor to the said office; and that it was the duty of the said Board

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of Canvassers, on the dissolution of the said injunction, to have canvassed and counted the votes returned from all the counties of the State and on file in the office of the Secretary of State, and to have decided and determined from the said returns that the said Bloxham was elected by the highest number of votes to the said office of Lieutenant-Governor, at said election, as shown by the said returns; and that such is now their duty.

That a majority of the said Board of Canvassers do not deny, but on the contrary expressly admit, that the said Bloxham was duly elected by a majority of the votes cast at the said election to the said office of Lieutenant-Governor, and that the fact so appears from the returns of the said election on file in the said office of the Secretary of State now, and at the time of the said pretended canvass and count, and when the same was concluded and finished; but a majority of said Board sometimes pretend that certain of said election returns were not received sufficiently early to entitle them to be counted, and that others of said returns were so defective and informal that it was the duty of the said Board to reject them from their said count because of such informality, whereas the contrary was true, and that it was the duty of the said Board to canvass and count all the returns from the several counties of the State on file in said office at the date of said canvass and count, irrespective of the date at which they were received, and regardless of any merely formal irregularities and defects appearing on the face of said returns.

That by reason of said failure of you, the said Jonathan C. Gibbs, Secretary of State, and of you, the said Sherman Conant, Attorney General, and of you, the said Robert H. Gamble, Comptroller, to canvass and count, as such Board of State Canvassers, the election returns of said election for Lieutenant Governor as aforesaid, on file in the said office of the said Secretary of State, from all the several counties of the State, and upon the completion of the said canvass

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and count to do further as required of you by law in such case made and provided, he, the said Bloxham, has been prevented from receiving the certificate, to which he was entitled, certifying that he had been elected to the said office, and has been prevented from receiving and obtaining from the said Secretary of State the certificate which has been made by law *prima facie* evidence of his election to said office, and is thereby unable to enter upon the discharge of the duties and is prevented from receiving the salary and emoluments of the said office, to all of which he is entitled, and is and has been thereby prevented from taking his seat as the presiding officer of the Senate, at the present session of said body, which, as the duly elected Lieutenant Governor of the State, it was and is his duty and right to do.

That the said William D. Bloxham, the petitioner, is entirely without remedy in the premises unless it be afforded by the interposition of this Court by their writ of mandamus.

Now, therefore, we being willing that full and speedy justice should be done in the premises, do command you, Jonathan C. Gibbs, Secretary of State, and you, Sherman Conant, Attorney General, and you, Robert H. Gamble, Comptroller, that you, or any two of you, forthwith meet and convene as a Board of State Canvassers, in the office of the Secretary of State, to canvass and count all the election returns on file in the said office of the Secretary of State of the said election for the office of Lieutenant Governor, held on the 8th day of November last, and that as such Board of Canvassers you canvass and count the election returns for said office from each and every of the counties of the State, and especially that you do canvass and count the said election returns from the counties of Brevard, Calhoun, Dade, Lafayette, Manatee, Monroe, Sumter, Suwannee and Taylor, which you have heretofore omitted, failed and refused to do, and that you determine who has been elected by the highest number of votes to the office of Lieutenant Governor, as

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shown by the said returns; and that you do determine and decide that the relator, the said William D. Bloxham, is shown by said returns to have been elected to the said office, and that you do make and sign the certificate required of you by law in such case, and that you, the said Gibbs, Secretary of State, do record or cause to be recorded said certificate as required by law, and that you, the said Gibbs, cause a certified copy of such certificate to be published in one or more newspapers printed at the seat of government of the State of Florida; and that you, the said Gibbs, do immediately after the completion of said canvass make and transmit to the relator, the said William D. Bloxham, a certificate showing the number of votes cast for each person for Lieutenant Governor at said election; or that you appear before the Judges of our Supreme Court at the Supreme Court Room, on Monday, the 16th inst., at 10 o'clock A. M., of said day, to show cause why you refuse to do so.

Upon the return of the alternative writ, the defendants moved to quash upon the ground stated in the opinion of the Court. After delivering an opinion sustaining the motion to quash, but authorizing the relator to amend the writ in such respects as the Court deemed necessary, the attention of the Court was called to an act of the Legislature then in session, which had been passed by the Legislature and approved by the Governor, by which the section of the law constituting the Secretary of State, Comptroller and Attorney General a Board of Canvassers, was repealed, the repealing act containing no clause saving the proceedings pending before the Board, or authorizing them to perform duties unperformed or unfinished. Upon a motion to dismiss the proceedings, the effect of this legislation is considered.

R. B. Hilton for the relator:

The act of the canvassers was no canvass. They rejected returns which should have been counted, and what was done was in contempt of an injunction of a competent court. 7

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Iowa, 186; Hilliard on Inj., 164; 1 Swann (Tenn.) 1. The illegal manner as to place and circumstances in which the pretended canvass was consummated makes it a nullity and void.

The reasoning of the court in the *People vs. Supervisors of Greene*, 12 Barb., 217, (the case relied upon by the respondents,) has no intelligent meaning as applicable to the present case. The State canvassers here it is manifest can convene and can now legally canvass the election returns. 3 Hill, 47; 7 Wend., 48; 2 Tex., 224; 11 Am. Law Reg., 409; 20 Pick., 484; 29 Ill., 413; 7 Iowa, 186; 27 Ill., 242. The specific object sought by the relator here is to procure the certificate showing the number of votes cast for the office of Lieut. Governor, which is *prima facie* evidence of his election. In 29 Ill., 413, the relator sought to procure such certificate. The court held that he was entitled to a compulsory mandamus. The relator does not seek by these proceedings to be admitted to an office, or to try his title to an office, but that evidence that he has been elected shall be furnished him. A peremptory mandamus can alone compel its delivery. There is no other remedy. The proceedings here cannot be too late, as they could not have been maintained until the board had by their adjournment consummated their default. 3 Kan., 88.

The conclusion from these authorities is that upon neither ground set forth in the motion to quash should it be granted:

First—The court has the power to issue the writ.

Second—The facts set forth demand the exercise of this power.

Third—The relator has not mistaken his remedy. For the evil complained of, the failure to count the votes and furnish him the certificate, mandamus is the specific and only remedy.

It is insisted by respondents that the Secretary of State does not issue the certificate of election to the person having the highest number of votes as one of the board of can-

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vassers. This it is urged is an act done in his official capacity as Secretary of State and not as one of the board, and that it never has been his duty to issue such certificate to the relator, as the board of canvassers had never made a certificate by which it appeared that the relator had received the highest number of votes.

The case of the *People vs. Hilliard*, 29 Ill., 413, is a complete answer to these positions. In that case the Clerk occupied the same relation as the Secretary of State in this, and the writ was awarded him compelling him to certify the election of the relator. The case here reported is in all respects similar to the present case. See also to this point 7 Iowa, 390.

As to the effect of the statute repealing the section which constituted these officers a board of canvassers, I cite 4 Ga., 208; 10 Barb., 223.

S. J. Douglas for the relator :

The statute of 1868 prescribes the duty of the board of canvassers.

This act gives no power or authority to the board of State canvassers to reject returns because they were not received on a certain day, or for insufficiency, irregularities or omissions in the returns themselves, or for any other cause. If they may be known as returns, they are to be received and counted.

The statute gives them no discretion in the matter. It makes their duty ministerial and not judicial, and points out the mode and manner in which they shall perform it.

Apart from the statute, they cannot derive this dangerous and extraordinary power from the law and usages in such cases.

When a statute directs a public officer to do a thing within a certain time or on a certain day, without any negative words restraining him from doing it afterwards, the naming

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the time will be regarded as directory merely, and not as a limitation on his authority.

Statutes directing the mode of proceeding by public officers are directory, and a strict compliance with their provisions is not essential to the validity of the proceedings, unless it be so declared in the statute.

This rule should be strictly applied to inspectors of elections, and to omissions by them to comply with the requirements of a statute, occurring through ignorance or inadvertence. They are public officers; their acts are of a public character, and concern the public interests, and the rights of third persons are concerned and affected by them. *The People vs. Cook*, 14 Barb., 290; *Holland vs. Osgood*, 8 Vt., 280; *Pond vs. Negus*, 3 Mass., 230; *The People vs. Allen*, 6 Wend., 486; *ex-parte Heath vs. Roome*, 3 Hill, 43; *The People vs. Holley*, 12 Wend., 481; *Jackson vs. Young*, 5 Cowen, 269; *The Mohawk and Hudson R. R. Co.*, 19 Wend., 143; *Rex vs. Loxdate*, 1 Burr., 447; 12 Conn., 243, 253, 255.

The duty of a board of canvassers of an election is not judicial but ministerial, in the performance of which there is no discretion to be exercised. They possess no power or authority to judge of the validity of returns or of votes. They are only to receive the returns, if they may be known as returns, and to count the votes, leaving all questions as to their validity or deficiency to that tribunal which is empowered to determine ultimately upon a contested election. 7 Iowa, 186, 390; 14 Barb., 259; 20 Wend., 14; 4 Selden, 67, 89; 20 Pick., 485; 2 Texas, 223; 3 Hill, 43; 2 Carter, 423; 25 Maine, 567.

Mandamus is the appropriate remedy to compel a board of canvassers to do their duty. In every well constituted government the highest judicial authority must necessarily have a supervisory power over all inferior or subordinate tribunals, magistrates, and all others exercising public authority. If they commit errors, it will correct them; if they re-

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fuse to perform their duty, it will compel them—in the former case by writ of error, in the latter by mandamus. 6 Dane's Abridg., 335; 3 Burr., 1265; 3 Hen. & Munf., 1; 20 Pick., 495; 14 Barb., 261; 7 Iowa, 199, 392; 4 Texas, 405; 4 T. R., 699; 5 T. R., 66; 17 Ill., 168; 6 Texas, 457; 2 Barb., 397; 4 Har. & McH., 429; 15 Ill., 492; 5 Binn., 102.

J. B. C. Drew, Attorney General, for respondents:

The court has not the power to grant the writ in this case. Laws of Fla., 1868, pages 28, 29 and 30; 12 Barb., 218.

The facts set up are not sufficient to entitle the relator to the relief demanded. 12 Barb., 218; 4 Wis., 797. The relator has not pursued the proper remedy. 12 Barb., 219; 3 John. Cases, 78; 12 Maine, 304; 20 Barb., 302.

RANDALL, C. J., delivered the opinion of the court.

An alternative writ of mandamus having been issued and served upon the respondents requiring them, as a Board of State Canvassers, to proceed to examine and certify the result of the late special election as it appeared by a canvass of all the returns from the several counties, and to declare the relator duly elected to the office of Lieutenant Governor of this State, and requiring the Secretary of State to record the certificate of the canvassers and to issue to the relator a certificate of his election based upon the result of such canvass, or to show cause before this Court why they should not do so; and the respondent Gamble having answered, signifying his readiness to comply with the mandate of said alternative writ whenever his co-respondents should join in so doing and proceed with the canvass as required by the relator; and the respondents, the Secretary of State and the Attorney General, by Mr. J. B. C. Drew, of counsel, now comes and moves the court to quash the alternative writ upon the following grounds:

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1. That the court has not the power to grant the writ in this case.

2. That the relator does not state facts sufficient to entitle him to the relief demanded.

3. The relator has not pursued the proper remedy.

In support of the first and second grounds of the motion, it is urged that the respondents having met and made a canvass of the returns of the election which had been received by them on the day appointed by law for proceeding with the canvass, and declared and certified the result thereof in due form, (although other and further returns of said election were received by them before the final conclusion by them, which had not been included in ascertaining the result of the election,) and had adjourned *sine die*, they were, as a board of canvassers, *functus officio*, and had no longer any right or power to act further as a board of canvassers and are therefore not amenable to the process of mandamus, the office of which writ is to compel the performance of a duty which has been neglected and which they have still the power to perform.

This position is taken by the Supreme Court of New York in the case of *The People vs. The Supervisors of Greene*, 12 Barb., 218, but we cannot adopt it as the law governing the case, and it is entirely overborne by the cases cited by the relator's counsel, decided in Iowa and Illinois. The allegations of the relator show that the respondents have but partially performed their duty and have neglected to comply with the requirements of the law, by refusing to canvass all the returns which were in their possession and which it was their duty to include in determining the result of the election. The respondents are appointed by the law of 1868 to be the canvassers, and their duties are to examine all the returns of the election and to declare therefrom who is elected by the greatest number of votes cast at the election.

The relator alleges that on the 29th day of November,

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1870, the respondents met for the purpose of making the canvass, and that at that time the returns had not been received from all the counties in the State; that at the instance of the relator, an order of injunction was procured and served upon them in terms restraining them from further proceeding with their duties until the further order of the Circuit Court or Judge who signed the order; that they thereupon adjourned until the — day of December, on which day a majority of said canvassers proceeded to certify and declare the result of the election, as the same appeared from the returns which had been received at the time of their first meeting, although it is alleged the returns had been received by them from all the counties in the State before the conclusion of the canvass.

The object of the law is to ascertain the whole number of votes cast, and who had received the highest number of such votes, so that the choice of the majority of the voters might be ascertained and respected. If the facts are correctly stated by the relator, the respondents neglected to perform this duty, and therefore did not comply with the law, in which case they did not conclude their duties as canvassers, nor put an end to their powers as canvassers by an adjournment *sine die*.

Their duties and functions are mainly ministerial, but are quasi judicial so far as it is their duty to determine whether the papers received by them and purporting to be returns were in fact such, were genuine, intelligible, and substantially authenticated as required by law; in other words, whether they contained within themselves evidence that they were authentic returns of the election. If, as is alleged, the respondents neglected to examine and include returns, duly and legally made from several of the counties, and therefore but partially performed what they were required by law to do, it must be considered that they have not complied with the law, and that they may be required to do so by means of the process here invoked.

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It is insisted by the relator that the proceedings by the canvassers were illegal and void, because they were enjoined by the order of a Judge of the Circuit Court from farther proceeding until the further order of the Circuit Judge; and that the respondents did proceed to declare the partial result of the election, of which the relator complains, before the dissolution of the injunctive order and without a further order of the Judge. We think the order of the Circuit Judge was unadvisedly made, and that in its form and effect it was essentially a perpetual injunction. It forbade the farther proceeding until permission should be granted by the Judge, and was in effect the abrogation of a statute which authorized and required them to proceed with reasonable dispatch, and it was therefore illegal.

In the view we have taken, however, of the merits of the case, the injunction is of no consequence to either party. It may be said that the canvassers would have proceeded to complete their work on the occasion of their first meeting but for the injunction; but this cannot affect the case. They did adjourn or postpone the completion of the canvass until, as is alleged, further returns were received, which they refused to recognize and take into the account.

But it is urged that the relator has not pursued the proper remedy; that the canvass by the Board does not determine the right to the office, and therefore he has yet to pursue his cause of action by the ordinary process of law to determine it.

If this proceeding was intended by the relator to obtain possession of the office, the objection might have force, but he seeks what the law entitles him to, if his statement of facts is correct, viz: a certificate by the canvassers of the result of the election, as appeared by the returns in their possession at the time they made their final statement, to be recorded in the Secretary's office, which would be *prima facie* evidence of such result; and the question is, whether he is entitled to this evidence upon the case stated. We think he is entitled to it, and because he is so entitled, he

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may have the necessary process to obtain it. That another form of proceeding may be necessary in order to obtain possession of the office and its dignity and emoluments, does not affect this question. What he desires is, to procure the ordinary and proper legal evidence of his *prima facie* right, upon which he may be enabled to prosecute that right in the appropriate form of proceeding.

But on examining the alternative writ, we discover that the relator requires more than he is entitled to upon the case stated, and therefore he cannot have the peremptory writ of mandamus in matter and form as demanded. The relator prays that the respondents collectively perform a duty which they have neglected and refused to perform; and farther, that one of them, the Secretary of State, be required to record their future proceedings; and that he give the relator a certificate of his election, to be founded upon the future determination of the canvassers, which, of course, he has not neglected or refused to do; and until the failure or refusal of an officer to perform his official duty, this process cannot be used against him. If the entire duties were required to be performed, under the law, by the Board of Canvassers, as the making the canvass, certifying the result, entering it of record, and the giving a certificate to the person appearing to be elected, the writ might go, upon their failure to perform the first of the series of duties, to enforce the performance of their whole duty pertaining to the subject matter. But the act required of the Secretary of State to be done after the performance of the duties by the Board of Canvassers, are not duties pertaining to those of the Board, but of the Secretary of State as such, and for which the respondents, as canvassers, are not responsible; and the fact, that one of the canvassers is the Secretary of State, who has the subsequent duties to perform, does not affect the case. If the Secretary, whose duty it is to do certain things subsequent to the determination of the canvass, was not one of the Board of Canvassers, it would scarcely

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be pretended that the writ could go against him as such Secretary in the present case, for it would be an abuse of justice to convict one of non-feasance or misdemeanor in neglecting his official duty, either for neglecting to certify to a fact, because the fact does not exist, or where he has not refused to do what may be required, and mulct him in costs when he is not in default. And though the respondents may be required to proceed and complete the canvass, and certify the result, if they and each of them cannot be required in the present proceeding to do all that is commanded by the alternative writ, the peremptory writ cannot issue. *Moses on Mandamus*; *Tapping on Mandamus*, and cases cited.

At the present stage, the peremptory writ prayed for must be denied, but the relator may amend the alternative writ so as to avoid the obstacle suggested, and if no legal answer be interposed, he will be then entitled to the peremptory writ.

This court, upon full consideration of this question, held to the same effect in *King vs. The Co. Coms. of Columbia*, and *Davidson vs. the same*, 13 Fla.

Before farther proceedings were had in this case, the attention of the court was called to the fact that the Legislature, then being in session, had passed an act which had been approved, repealing the 28th section of the law of 1868, relating to the holding of elections, by which section the respondents were constituted a Board of Canvassers; and the section was not re-enacted, nor does the repealing act contain any clause saving proceedings pending or duties unperformed by them.

After argument, it was announced by the court that the present proceedings must be dismissed, because the Board of Canvassers being a special tribunal created by statute, and their duties created by the statute, the repeal of the statute takes away their functions as canvassers, and they cannot proceed farther in the matter under any law. And

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it follows that they cannot be compelled to do what the law does not require of them, not even to finish what they have commenced. This view is sustained in 6 Pickering, 501; 11 Maine (2d Fairfield), 284; 34 Maine, 14; 36 ib., 62; 40 ib., 507; 41 ib., 158; 10 Wis., 481.

The proceedings are therefore dismissed.

RICHARD M. BUSHNELL, ADMINISTRATOR OF ISABEL FORSYTH, *et al.* vs. WILLIAM DENNISON, INFANT, &C.

The law of descents in 1828 provided that the real estate of intestates should descend in parcerary to the male and female kindred in a certain course, viz.: 1, to children; 2, to the father; 3, to the mother, brothers, and sisters; 4, for want of these or their descendants, to paternal and maternal kindred in moieties, &c. In that year provision was made by law, that personal property should "be distributed according to the law regulating descents." In 1829, the previous law of descents was repealed and re-enacted, with *provisos*, (Duval's Compilation, 361,) that whenever an infant shall die without issue, having title to any real estate of inheritance derived from the father, and there be living any kindred on the side of the father of the infant, such estate shall pass to the father or the paternal kindred, without regard to the mother or maternal kindred, saving the mother's right of dower. And if the real estate of such infant was derived from the mother, the same should descend to the mother or maternal kindred, without regard to the father or paternal kindred: *Held*,

1. That the act of 1828 adopting "the law regulating descents" as the rule for the distribution of personal estate, applies to any law regulating descents in force at the time that the right to the distribution becomes vested, (agreeing with *Jones vs. Dexter*, 8 Fla. 278.)
2. The *provisos* contained in the act of 1829, entitled "An Act Regulating Descents," being paragraphs 10 and 11 of section 1, are part of the law regulating descents, and furnish a rule for the distribution of the personal estate of an infant, derived from the father or the mother, as the case may be, it being the intent of the law that the personal estate should be distributed by the same rule that governs the descent of real estate.—(Overruling the decision in *Jones vs. Dexter*.)

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Appeal from an interlocutory order of the Circuit Court for Escambia county.

The opinion states the facts and the points involved.

Mallory & Maxwell for Appellants.

Campbell & Jones for Appellee.

RANDALL, C. J., delivered the opinion of the Court.

The facts are briefly thus: Joseph Forsyth died leaving a widow and three children, to-wit: Isabella, Josephine and Mary. The widow, (mother of the three children,) afterwards married one Dennison, and had one child, William Dennison, the appellee. The mother died, and afterwards Isabella, leaving her two sisters of the whole blood and her brother of the half blood surviving. The bill in this case was filed by the said William Dennison *per pro ami*, to recover one-fifth of the personal estate of Isabella, which had been derived from her father, Joseph Forsyth. The administrator of Isabella filed a demurrer to the bill which was overruled by the Circuit Court, and from this ruling an appeal was taken by the administrator.

The question presented involves the determination of the rule for the distribution of the personal estate derived from the father of an infant dying without issue.

The history of the legislation affecting the question, is given in the opinion of the Court in *Jones vs. Dexter*, 8 Fla., 276.

In 1822, at the first session of the Territorial legislature, an act was passed known as the act regulating descents.— This act continued in force until the year 1828, when it was re-enacted by the statute known as the “condensation act.” That condensation act expressly repealed all acts theretofore passed, which should not be enumerated in it, and expressly re-enacted all such as should be so enumerated by their respective titles. Amongst the acts so enumerated was this

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act of 1822. At the same session in 1828, an act was passed directing the mode in which *personal* property should be distributed. The provision of that act is as follows: "That after all debts and legacies have been paid, the property remaining in the hands of the executor or administrator shall be distributed according to the law regulating descents."

At the next session of the Legislature, in 1829, a new act to regulate descents was passed and the old act on that subject was repealed. The new act embodied substantially the provisions of the old act, but contained as provisos two additional sections.

The provisos enacted, "10th. That whenever an infant shall die without issue, having title to any real estate of inheritance derived by gift, devise or descent from the father, and there be living at the time of his death his father, or any brother or sister of such infant on the part of the father or paternal grand-father or grand-mother of the infant," &c., then such estate shall pass to the paternal kindred, without regard to the mother or other maternal kindred, "saving, however, to such mother any right of dower which she may have in such real estate of inheritance."

The 11th subdivision being the second proviso, declares that the real estate of an infant derived from its mother, in case of its dying without issue, shall descend and pass to the mother and maternal kindred without regard to the father or other paternal kindred, "saving, however, to such father the right which he may have as tenant by the courtesy in the said estate of inheritance."

These statutes are, as to their legal effect, substantially the same as those of Virginia, which received a construction by the Virginia Court of Appeals in 1801, and again in 1810. That construction was that the statute of distribution, requiring the personal estate of deceased persons to be distributed according to the law regulating descents, gave the personal estate of an infant deceased without issue, to the paternal kindred, if the estate was derived from the father

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to the exclusion of the mother and the maternal kindred; and to the maternal kindred if the estate was derived from the mother, to the exclusion of the paternal kindred; in fact giving the personal estate the same direction as the real. I am unable to discover on examination of the statute of Virginia any such substantial difference as to its effect in this case, or in the case of Jones vs. Dexter, as as perceived by the majority of the Court in that case. Our statute, if not borrowed from that of Virginia, must have been copied or derived from the same source.

The Court of Appeals of that State in 1801, when the case of Tomlinson vs. Dilliard (3 Call, 105,) was first considered, was composed of five judges, four of whom concurred in the construction stated, and one, (Judge Roane,) dissented, holding that the personal estate of an infant should be distributed under the statute according to the general law of descents, and that the proviso controlled only the course of the real estate.

In 1810 the same case came again before the same court, then composed of three judges, two of whom were members of the court in 1801. The opinion of Judge Roane upon the last argument (in 1810) was very able and elaborate, reiterating his former conclusions. (1 Munford, 183.) While his associate, Fleming, then became president of the court, and Judge Tucker, who had not participated in the former decision, re-affirmed the judgment first given, considering "that the words of the law are too plain and positive to admit of doubt or construction," and "too clear and explicit to admit of a doubtful meaning." (See also Tarpleman vs. Steptoe, 2 Munf. 389.) The statute of Virginia provided that the personalty should "be distributed in the *same proportion and to the same persons* as lands are directed to descend in and by an act of the General Assembly, entitled an act to reduce into one the several acts directing the course of descents." The statute of Florida says "the property remaining in the hands of the executor or administrator shall be

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distributed *according to the provisions* of the law regulating descents." The law "regulating descents" in both States being substantially alike, I can discover no difference in the application of the law of distribution. The words, "distributed in the same proportion and to the same persons," in the one case, and the words "according to the provisions of" the same law, are so nearly alike in their evident intent, that I have been unable to discover any reason for applying them to diverse provisions.

The Virginia Judges were evidently desirous of giving a different construction to their statute, and would have done so if they could have discovered any "manifest intention" of the Legislature to justify a departure from a plain and positive provision of the law; for it seems they were so thoroughly opposed to the law, as they felt obliged to construe and apply it, that they besought the legislature to change it, and it was changed in accordance with their suggestion.

Very many of the prominent men who were the pioneers and early settlers in this portion of the country came from Virginia, and it was natural that they should bring with them a partiality for many of the laws of their native State, and that the laws relating to the descent of property were among those to which they attached great importance is beyond question. It is equally certain that the Legislature, composed of intelligent gentlemen, in adopting a statute of another State, are presumed to know the effect and the interpretation given to such law by the courts of the State from which the law was borrowed, and particularly of this important law which had been construed by the Court of Appeals, and whose decision must have been known quite familiarly to gentlemen of the legal profession, many of whom came to Florida from the "Old Dominion." These circumstances have more or less bearing in finding the intent of a statute, and are frequently considered by the highest courts in their constant endeavors to carry out the purposes

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of law makers. "*Contemporanea expositio est fortissima in lege.*"

It is therefore quite probable that it was intended that the language of a Virginia law enacted here, should have the same force and meaning in Florida as in Virginia, and that the interpretation it had received in Virginia would be given to it in this State. Such seems to have been the case. Judge Thompson has this note on p. 191 of the Digest: "In the case of Marr et al. vs. Keenan, before the Hon. Thomas Douglass, in Gadsden county, Fall Term, 1845, it was ruled that the 'law regulating descents' referred to (in the section providing for distribution of personalty,) was such law regulating descents as might be in force when the contingency happened. That the Legislature intended that real and personal estate should be distributed according to the same rule." Judge Douglass afterward in 1854, as a Judge of the Supreme Court, in the case of Young's adm'r vs. KcKinnie's adm'r, 5 Fla., 542, giving the opinion of the Court, held that the surviving brother of an infant took all the personal estate of the deceased which was derived from the father, the mother not being entitled to inherit. It is true it does not appear that the question was argued in reference to the question now before us, but the court in that case affirmed the decree in that respect, which decree treated the property as that of the surviving brother "without regard to the mother" who survived.

It may be said that this decision was not entitled to much weight as authority, but it was a solemn adjudication of the rights of property upon principles of law which appear to have been treated *as settled* and unquestioned, so far as can be judged by the published report of the case, (and it is remarked, by the way, that one of the counsel for the appellant in that case is of counsel in this case, and the Justice who delivered the opinion in Jones vs. Dexter was of counsel on the other side.)

It is stated in the dissenting opinion of Baltzell, C. J., in

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Jones vs. Dexter, that for thirty years before (1859,) "by common consent of lawyers, judges and people, this had been the settled construction, and estates during all this time had been settled and adjusted and rights derived and acquired under it. Our digests and compilations have been on this understanding. These same objections, scarcely varying in language or form of expression, were stated by one of the justices of the court of Appeals of Virginia, and earnestly insisted on, but overruled by four of his associates, and again urged on other occasions and overruled upon statutes almost identical with ours." And quotes Reeves on Descents, 26: "Where a statute is in the terms of the law of another state, or of an English statute, the construction of their courts is to be regarded as much so as if it had been detailed at length in the statute."

In the case at bar, the circuit judge decided, in overruling the demurrer, in accordance with the judgment in Jones vs. Dexter, that the provisos (numbered 10 and 11,) applied only to the real, and that the personal estate was distributable according to the law, excluding the provisos. The appellants ask that the doctrine of the decision in that case be overruled. The appellees insist that that decision was correct, and that the rule in that case has been the law of the State for eleven years, as a rule of property, and has controlled the settlements of estates. That in construing statutes, the office of the court is to give certainty and precision to arbitrary rules, and hence the rarity of conflicting decisions upon statutes. "That after a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness, and the community have a right to regard it as a just declaration of the law and to regulate their actions and contracts by it." "When a rule has been once deliberately adopted and declared, it ought not to be disturbed unless by a court of appeals, and never by the same court, except for very cogent reasons and upon a clear manifestation of error."

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"But even in such cases, (says Broom's Legal Maxims, 62,) the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For, if it be found that the former decision is manifestly absurd or *unjust*, it is declared, not that such sentence was bad law, but that it was not law; that is, that it is not the established custom of the realm, as has been erroneously determined."

In the opinion in *Jones vs. Dexter*, the court was not unmindful of the great importance of adhering to former decisions in cases of this character, and of the cautions suggested as to the unsettling of estates, "but we are yet to be satisfied (say the court) that such would be the effect of this ruling; for considering the brevity of our political existence and the extreme rarity of estates thus derived, there cannot, in the nature of things, be much cause for misapprehension on that score. At any rate, it is the imperative duty of this court to announce the law as it is, and not to be deterred from its duty by considerations so remote and uncertain."

Impressed with the importance of abstaining from an unwarrantable departure from the unbroken current of decisions of the courts in respect to those rules of property and common rights under which and upon the strength of which rest the security of all the business transactions of life, we hesitate upon the threshold of inquiry and first determine whether, whatever our private notions and individual judgment may be, we shall entertain the inquiry which is presented in this appeal; for, if it be apparent that wrongs may be inflicted upon the community by the unsettling of the tenures of property and the rules for the settlement of estates by the judicial abrogation of a rule which we may conceive to be against law, and which more than counterbalance the justice of the application of what we conceive to be a correct and true application of the law, it may be considered our duty to adhere to the error. It was once said that it were better to adhere to an old error than

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to promulgate the truth, but we cannot understand that we are instructed by the sages that this is good law or sound philosophy. If one be deprived of that which he is plainly entitled to by an adhesion to arbitrary rules of convenience, based upon sage precepts which have become venerable without pretence of having foundation in justice or correct expositions of written law, we do but sacrifice the rights of the innocent for the sake of maintaining an error and protecting a right of a third person which has no foundation but in wrong and in the perversion of the law. If a party established a right to the satisfaction of our judgment and conscience, and has not lost that right by his own conduct or laches, must we deny its enjoyment to him because it has been an uniform practice of courts, in this or some other age, to deny such rights to others?

Referring to the case before this court, we are not driven even to the resort of announcing new doctrines or upsetting the long current of judicial dicta, if we shall come to a conclusion other than that found in *Jones vs. Dexter*; for against that decision we find this question otherwise determined seventy years ago in that State, which, at the time mentioned, had produced statesmen and legal philosophers second to none in any country. Next, for thirty years, down to 1859, the same rule was observed and the words of the law were given the same meaning in Florida that they had borne elsewhere. And we may feel that we are guilty of no serious innovation upon a rule of property or propriety if we declare our convictions that a rule of ten years' standing may be revoked, and that a contrary rule should prevail which we are satisfied is correct and which has been approved for seventy years by the judicial mind of the country, without apprehending that a long train of serious consequences will follow the declaration.

It is an established rule of construction that an act of Parliament shall be read according to the ordinary and grammatical sense of the words, unless, being so read, it

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would be absurd or inconsistent with the declared intention to be collected from the rest of the act, or unless an *uniform series of decisions* have already established a particular construction. (Broom's Maxims, 248.)

The law regulating descents, as it stood in 1828, (when the act providing for the distribution of personal estate was passed,) provided that whenever any person, having title to real estate of inheritance, shall die intestate as to such estate, it shall descend in parcenary to the male and female kindred in the following course, that is to say: 1, to his children or their descendants, if any; 2, if there be no children nor their descendants, then to his father; 3, if there be no father, then to his mother, brothers and sisters and their descendants; 4, if there be no brother nor sister nor their descendants, the inheritance shall be divided into moieties, one of which shall go to the paternal, the other to the maternal kindred, &c.

The act of 1829 embraced and re-enacted these provisions, and the provisos, being paragraphs 10 and 11, were added to and incorporated in it as a part of the law regulating descents, and all laws not coming within the purview of this act were repealed. It is conceded that the "law regulating descents," mentioned in the act for distribution, is such law as may be in force when the contingency occurs, and such was the view of the court in *Jones vs. Dexter*.

The rules for construing statutes, quoted in that case, are the true guides in endeavoring to ascertain the intent of the Legislature, and to solve questions of doubt, and we shall be guided by them. It is upon the application of those rules to the matter in question that we are forced to differ, with all deference, with the majority of the court in that case.

There is also a primary rule very proper to be observed in reference to legislative acts, which is, that the true meaning of a statute is generally to be sought from the body of the act itself; that the intention of the law-maker is to be deduced from the whole and every part of a statute. And

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when the words are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the remedy in view. Several acts or provisions *in pari materia*, and relating to the same subject, are to be taken together and compared in the construction of them, because they are considered as having one object in view.

Before the enactment of the provisos, the property, real and personal, of every person, whether an adult or an infant, dying intestate, was, by the statute, distributable according to the course last above quoted, that is: first, to children; second, if there be no children to the father; third, if there be no father then to the mother, brothers and sisters; fourth, for want of these, the inheritance to be divided into moieties, and one-half to go to the paternal and other half to the maternal kindred, &c. The rule was changed by the law of 1829, so that the real estate of a class of persons, viz: infants, should go to the paternal or maternal kindred, according to the source from which it was derived, saving the rights of dower and tenancy by the courtesy, as the case might be. The presumption is, that the Legislature which enacted this proviso was cognizant of the law as it stood before, and of the effect of the remedy they then proposed; that they knew that the law already provided that the personalty should be "distributed according to the provisions of the law regulating descents;" and it is certain that the "law regulating the descent" of the real property of an infant was, by the proviso, to go in a direction other than the property of an adult. With the statutes before them, and with the construction and application that had been given by the courts of the State whence the law was derived also before them, it is not to be doubted that if they had intended that the personal property of infants should not go to the same person as the real property, they would have said so in plain words, instead of leaving the plain words, already written, to stand against such intention.

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But it is urged that "the nature of the property, and the title by which it is held, to say nothing of the inapplicability of the saving clauses in those provisos, show that it could not have been the design of the Legislature that they should apply to personal property."

It seems to us not difficult to imagine that personal estate, whether in specific property or in dollars, may be bequeathed or directed in general terms to be distributed according to the rule provided in a will for the disposition of real estate, whether according to the proportions or the persons to whom it may be devised. What is there in the nature of personal property that is repugnant to such a disposition of it? What is there in the origin of the title of personal property which prevents its distribution by the same rule? Is it impracticable to bequeath (and to execute the bequest,) that certain personal property derived from John Doe shall go to one person, and that derived from Richard Roe shall go to another person? And if an executor or a guardian shall have suffered such property to be intermingled with other property, so that its *identity* cannot be easily ascertained, should that defeat the wish of the testator? Is there no means by which the *value* in such case may be ascertained? By what law may a guardian suffer the property of an infant derived from different sources, to be so lost in identity that a bequest by a testator of property to an infant and to a third person, in case of the death of the infant, may be defeated, and such third party thereby deprived of a remedy? Or, if the guardian shall have properly performed his trust, and the property *may* be distinguished, what will prevent the execution of the bequest? If the identity of the personal property of an infant be lost by carelessness or by confusion, somebody should be accountable for it. That personal estate derived from different sources *may* be so confused as that its subsequent identity may be difficult, it does not therefore follow that it should be so.

But, it is said, that the "saving clauses" in the provisos

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are inapplicable, and therefore the provisos cannot apply to the personal estate. The real estate of the infant derived from the father, by the provisos, goes to the paternal kindred to the exclusion of the maternal kindred, saving the right of dower to the mother of the infant. This saving clause of course applies to real property, and does not apply to personal; and if it does not affect the personal estate, how can there be any difficulty in distributing the personalty to the same persons as are entitled to the realty, though the realty be encumbered by dower interests, or leases, or mortgages, or other determinable estates? It is rather the inapplicability of the provision for dower in relation to personal estate that must be rejected in the distribution, rather than reject the provision for distribution, because of the provision for dower in real estate. The provision relating to dower was probably unnecessary, as the widow is entitled to dower at all events, and that provision might have been wholly omitted without affecting the widow's right, as it was omitted in the law of descents generally. What becomes then, of the objection that the clause saving the dower because of its inapplicability in distributing personal estate, is incompatible with the distribution act, and that, therefore, the personal property cannot be distributed under the provisos? As well may it be said it cannot be divided at all in accordance with "the law regulating descents," because under that law the widow is entitled to dower in the property to which it refers, and the "saving clauses" are no more necessary in the one law than in the other for the protection of her interests.

Another objection to the application of the act of distribution is, that it may work unjustly, in that the property derived by the infant "by descent from the father," may have been derived by the father from the dowry of the wife by the marriage according to the common law, and therefore, the exclusion of the mother from taking such property

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is pernicious, and could not have been intended by the Legislature without presuming that they were ignorant of the canons of the common law, which give all the wife's personal property to the husband. Even if such objection might properly be urged against a legislative enactment, and the courts refuse to give it effect because of the apparent or possible injustice of its enforcement, and because it may not be "consonant with the best affections of the heart," or commend itself to the general approval of mankind, it can have no force in this State at the present time, for since A. D. 1845, all the property of a woman acquired before or after marriage is her separate estate, the husband having no interest in it during coverture, except in the character of a trustee or a tenant.

But this objection to the injustice of the law in the respect mentioned, was equally potent against the rule of the common law, which deprived a married woman of all her personal property and all control over her real estate; and if it be the province of the courts to nullify laws, because of the injustice and hardship of their application, there has been for centuries ample opportunity for the fulmination of the judicial thunder against this most unnatural, unjust and oppressive law, handed down through the progress of civilization, almost intact, from the confines of barbarism.

This argument, however, we conceive to be appropriate to be addressed rather to the Legislature than to the judicial department. The court of Virginia, after pronouncing its judgment in obedience to a hard statute *ex mero motu*, besought the Legislature to change the law, and it was done. The argument springs from the kindest affection, and addresses itself to our humanity. We cannot conceive why the mother, who has spent her youth and strength in a labor of love and devotion to her child, should, after burying it from her sight in its narrow house, be turned from her home beggared, "according to law," with neither the consolation nor compensation of sharing in the property of her dead child,

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even though the property may have been brought home by herself, or earned by the joint labors of herself and her husband. And there may be injustice in the other course of the law of descents. One of two children who have inherited a fortune in money and goods, of plate and family pictures, and mementoes from their father, dies, leaving several brothers and sisters of the half blood, the children of the mother's second marriage. By the law of descents, without the "proviso," the surviving child must divide the patrimony with the children of a stranger to his father's house and name, and surrender to them or purchase from them the property and family jewels earned and acquired by the labor of his own ancestors, and thus become impoverished and beggared upon principles of "natural affection," and according to the statutes. And again, if the mother take by right of inheritance the personal estate of the child, which was derived from his paternal ancestors, and the mother happen to become the wife of another, by the rules of the common law the property inherited becomes, upon the marriage, the property of the second husband, and so, practically, the second husband becomes the heir of the child of another, through those same principles of natural affection which are invoked to control the application of this statute.

But the courts are not responsible for the language of the written law, and are not accustomed to explore the fields of romance in quest of rules for their guidance in construing statutes or applying the law. Persons who become possessed of considerable property generally dispose of it by will, and if they neglect so to dispose of it, or if they are from infancy or other causes incapable of disposing by will, the law, after their death, regulates and directs the manner of its disposition and distribution, and so the law makes a will for the intestate. We do not think that a last will and testament directing the course of personal property according to the rule prescribed by the provisos in question, would be set aside because of the supposed inapplicability of the saving clauses,

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or that it would be found impossible or impracticable to carry out the intention of the testator, and this being the case, we cannot allow a possible inconvenience to control, and so disregard the positive provisions of the statute.

In this case, the mother of Isabella Forsyth died before the death of Isabella, so that with respect to the natural claims of the mother no argument can be attempted. The question is, whether the sisters Josephine and Mary are entitled to the property of Isabella, which came to her from her father, or whether they must divide it with the half brother, William Dennison. The common law of England would give the property to heirs of the whole blood, disregarding those of the half-blood. Many, and probably most of the States of this country give certain portions of the estate, if there be no direct heirs, to kindred of the half-blood, and this is the law here, but the *provisos* in question give the property of infants, derived from their father, to the kindred of the father only, and except that the mother ought not in justice to be excluded, we cannot say that the law so understood should be changed.

We think the property of Isabella derived from her father, descended, (under the statute of distribution and the *provisos* which are parcel of the law regulating descents,) to her sisters of the whole blood, and believing that upon the death of Isabella the property vested in the sisters, we cannot, with only the single and recent case of *Jones vs. Dexter* before us upon the one side, and the older adjudicated cases and the uniform rule of those cases adopted and followed in this State up to the time of the decision in *Jones vs. Dexter*, affirm a decree that the sisters shall be deprived of any portion of the property which we believe belongs under the law to them. Had the doctrine of the latter case been so long acquiesced in and followed as to become such a rule of property that any considerable mischiefs would follow the reversal of that rule, we should be inclined reluctantly to acquiesce in it and consent to the sacrifice of the strict rights of

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these appellants "for the public good;" but as we do not feel obliged to adopt the rule in that case, we are not embarrassed in deciding that the order of the Circuit Judge overruling the demurrer should be reversed.

WESTCOTT, J., delivered the following dissenting opinion.

The question involved in this case is whether the distribution of the personal estate of an infant decedent is to be made according to the rule prescribed for the descent of his real estate. This question is not *res integra* in this State. It was determined in the negative after argument and mature consideration in the case of Jones vs. Dexter, decided by this court in the year 1859. 8 Fla., 296.

The argument of counsel for appellants, the opinion of the majority of the court in this case, and the dissenting opinion of Mr. Justice Baltzwell in the case of Jones vs. Dexter, (8 Fla. 296,) are based principally upon an assumed similarity of the questions involved in this case, with the questions involved in the cases of Tomlinson, *et al.* vs. Dillard, 3 Call, 98, decided by the Court of Appeals of Virginia in 1801, and of Dillard vs. Tomlinson, Wyatt *et al.*, (1 Munf. 198,) decided by the same court in 1810. It is necessary therefore to enquire whether the cases are similar, and to a complete understanding of the subject it is essential that the history of the legislation in the two States in the matter of descents and distributions should be stated and compared.

In 1785, the Legislature of Virginia passed an act regulating descents, which Chief Justice Reeve of Connecticut describes as "an act drawn with great accuracy and legal science." This act prescribed the *same rule for the descent of the real estate of an infant as of an adult*. In 1790, the Legislature of Virginia amended this act of 1785 and changed the rule of descent where an infant died having title to real estate of inheritance, by providing that the maternal kindred should take no share in the real estate derived

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by purchase or descent from the father, at the same time excluding the paternal kindred from any share in the real estate derived from the mother, saving in all cases the right of dower of the wife and the right of the husband as tenant by the courtesy. In 1792 a new act of descents was passed in Virginia incorporating these acts of 1785 and '90 into one act. This is a brief statement of the legislation of Virginia upon the subject of descents up to the time at which the case in 3 Call arose. The legislation in the same State regulating distributions was as follows: In 1785, and at the same session at which the act regulating descents was passed, an act regulating the distribution of the personal property of intestate decedents was passed, which provided that the surplus of chattels "*should be distributed in the same proportions and to the same persons as lands were directed to descend in and by an act of the General Assembly, entitled an act directing the course of descents,*" which was the before mentioned act of 1785. This act controlling distributions remained in force until 1792, when all of the acts upon the subject of descents were, as before stated, reduced into one. A distribution act was passed at the same session. It provided that the surplus of chattels should be distributed to the *same persons and in the same proportions as lands were directed to descend*, by an act of the General Assembly entitled an act to reduce into one the several acts directing the course of descents, which was the before mentioned act of 1792, embracing the provisions of the acts of 1785 and '90. So we see that the act regulating descents and the act regulating distributions, which were in force when the case in 3 Call arose, were each passed at the same session of the Legislature, and the distribution act adopted in very words the rules of descent *prescribed by a particular act* as the rules for distribution. It is also seen that in Virginia the change of the law in respect to the descent of the real estate of an infant was made in 1790, and that there was no pretence that this change was extended to distribution until 1792, and

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that the rule for the distribution of an infant's chattels was without question the same as that for an adult's, from 1785 to 1792. It is remarked by Judge Roane that it was not the intention or purpose of the Legislature of 1792 to alter the law in reference either to descents or distributions, but to reduce the existing laws upon each subject into one act. This remark is certainly sustained not only by the fact that the alteration so far as distributions was concerned, was made some time after the same modifications in the rule of descents, but also by the particular character of the legislation of that session.

Upon examination it will be found that this session was principally devoted to a consolidation of the several laws upon different subjects. Thus we have acts to "*reduce into one*" the several acts concerning executions, a like act as to fees of officers, a like act as to the practice of the Court of Appeals, a like act as to the court of chancery, a like act as to the general court, and five other acts of similar character.

We have thus the legislation in Virginia upon these several subjects when the decision in 3 Call, to the effect that the personality of an infant should be distributed as his realty would descend, was announced.

We next inquire as to the legislation in this State upon these subjects up to 1859, when the decision of Jones vs. Dexter was announced.

In the year 1822, an act regulating descents was passed, which was substantially the same as the act of 1785 of Virginia. *In 1828, a consolidation act upon the subject was passed. It, however, made no distinction in the law of descents when applied to infants and adults.* In 1829 the act of 1828 was repealed, and a new act passed containing substantially the provisions of the act of 1828, and in addition thereto provisos making a difference in the rule to be applied to the real estate of an infant, and the rule to be applied to that of an adult, by providing that an infant's real estate

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should go to the maternal kindred if derived from the mother, and to the paternal kindred if derived from the father. (Thomp. Dig. 189.) As to the statutes regulating distributions, there has never been but one act upon the subject. This act was passed in 1828 and it provided that distributions should be made "according to the provisions of the law regulating descents." This statute was enacted with reference to the then existing act of 1828 regulating descents, which made *no difference in the rules to be applied to infant's and adult's real estate*, so that while upon the repeal of the statute of descents of 1828, and the enactment of the statute of 1829, the legal effect of this legislation may have been as was decided by the majority of the court in *Jones vs. Dexter*, and in this case, to make the rule enacted in 1829 control the distribution, yet this result follows from a rule of construction adopted by this Court rather than from any intention of the Legislature expressed in *totidem verbis* to that effect. Hence it cannot be said of the statute of distributions in Florida, as was said of the statute in Virginia, that it adopts the statute making a difference between the rule applied to the property of an infant and that of an adult in express language, leaving no room for the operation of established rules of construction by which the intention of the legislature may be determined.

With this, I think a correct statement of the legislation in the two States, we are prepared intelligently to analyze the case in the one State and ascertain whether it is analogous to the case in the other, as well as to examine the grounds of the opinions of the several eminent jurists that have entertained different opinions upon the subject in the several States. An examination of the opinions of the several judges in Virginia will show that the peculiar phraseology of their statute of distributions had a controlling influence upon them. Not one of them was pleased with the result they reached. They appealed to the Legislature to change it, which was promptly done. So that the rule established by the Virginia de-

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cision was condemned by every member of the Court and by the Legislature in Virginia. The statute of distributions in Virginia, as we have seen, declared that the personal property "*should be distributed in the same proportions and to the same persons as lands are directed to descend in and by an act of the General Assembly entitled an act to reduce into one the several acts directing the course of descents.*" Judge Fleming admitted the confusion and difficulty which would result from the application of the rule prescribed for the descent of an infant's real estate to the distribution of his personal estate, but said, I am "bound down by the positive precepts of the adopting statute." Carrington, Justice, said that while the rule was inequitable, the terms were too explicit to admit any latitude in construction, that the declaration that the personal property shall be distributed "*in the same proportions and to the same persons*" was too positive. Pendleton, President, said, "the words of the law appear to me to be too strong to admit of any construction by this Court."

Having thus stated the reasons given by the majority of the court in Virginia for the decision, it is well to refer briefly to the reasons given by Mr. Justice Roane (who dissented) for his conclusion that the provisos in the Virginia statute regulating the descent of the infant's realty did not control the distribution of the personalty. In the first place he admitted that the word and letter of the statute were positive and express, but contended that even this unequivocal expression by the Legislature might be controlled by consequences and the reason of the law taken on a general view, and maintained that the provisos should be rejected in the distribution of personalty for the following among other reasons: Because they were provisos containing terms only applicable to real estate, such as the words descent, dower, and courtesy, and that the same principle which justified the rejection of these *particular* terms, as applied to personalty, justified the rejection of the entire section; because

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while in the case of realty there could be a reciprocal operation of the statute as between the maternal and paternal lines, yet this manifest intention of the Legislature could not prevail as to goods and chattels brought by the wife to the marriage, as by the marriage they belonged to the husband; because it could not have been the intention or design of the Legislature, in the event of the death of an infant child, by a first marriage, to deprive the mother and her children, by a second marriage, from enjoying any portion of her own personalty, brought to the family upon the first marriage, and to bestow it even to the exclusion of the mother upon the children of the first marriage; because there was a difference in the nature of the subject matter of the two statutes, which rendered it impossible for it to operate as a general rule; that the idea that the Legislature intended to apply the principle of the first purchaser to the case of chattels, could not be sustained on account of the absurd consequences which would result; that while the words of a statute separately taken might be clear, yet, if when applied to a different subject matter than they were originally intended to control, the results were inconvenient and absurd, and these results grew out of the difference in the nature of the subject matter, the rules of construction required that it should be held that such was not the intention of the Legislature; that the clear intention of the Legislature in the matter of the descent of infant's real estate was, that property coming from the mother should go to her relations, as well as the converse in reference to the father, while to follow the letter as applied to personalty it would result that all personal property, however derived, would go to the relations on the part of the father. (3 Call, 96; 1 Munf., 190.)

We have thus given the views of the majority and minority of the court in the Virginia cases, and are enabled to see precisely what those cases were.

In the case of *Jones vs. Dexter*, (8 Fla., 296,) the Supreme

Court of this State (Baltzell, J., dissenting,) held that the provisos did not obtain here in the distribution of the infant's chattels contrary to the decision in Virginia.

It reached that conclusion by the application of two principles of construction, which it announced as follows:

1. That where the provisions of an act are adopted by a general reference, the act will receive a more liberal construction than if originally passed with reference to the particular subject.

2. Where a statute has been enacted with special reference to a particular subject, and by another statute its provisions are directed in general terms to be applied to another subject of an essentially different nature, the adopting statute must be taken to mean that the provisions of the original statute shall be restrained and limited to such only as are applicable and appropriate to the new subject.

The first named rule is certainly sustained by the authorities cited in that case, (Dwarr. on Stat., 508, 602, 556; 2 Inst., 287; 6 Q. B., 343; 2 Vatt., ch. 17, § 285; 1 Hare, 210,) and I think it cannot be doubted that the particular nature of personal property was, under the circumstances, a matter to be considered, and if the nature of that property rendered these provisos inapplicable to it, and produced consequences absurd in their character, or in conflict with the reason of the law, that they were properly held inapplicable. The court in *Jones vs. Dexter* justified its difference in conclusions from the Virginia case, to a considerable extent, by the difference in the precise words used in the adopting statutes of the two States, showing that the words in the Virginia statute were "special and definite," admitting of no construction, in the opinion of that court, while the language in the Florida statute was general and not of such character as to prohibit the application of the ordinary rules of construction. There was no such language in the Florida statute, as we have seen, was employed in the Virginia statute. This court, in *Jones vs. Dexter*, did not propose to contro-



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vert the Virginia decision when viewed in reference to the legislation of that State, but on the contrary, the difference in the conclusion is based principally upon a difference in the precise character of the legislation of the two States.

As between jurists of such ability as composed the court deciding the case in Virginia, I would not presume to settle differences as to the effect of their legislation, but I am entirely satisfied that not only do the differences in the legislation of the two States, which were mentioned in the case of Jones vs. Dexter, exist, but I am also satisfied that there is another and additional fact, not alluded to in that case, which would have had great weight in leading me to the conclusion that the provisos should not be extended to personal property. This is, that in Florida it is only by virtue of the fact *that the court* held that the statute of descents in operation at the time the distribution should happen, should control the distribution, that *these provisos became in any view operative as a rule of distribution*. They were not in existence when the distribution act adopting the rules of descent as the rule for distribution was passed, (A. D. 1828,) and these provisos could not therefore have been in the mind or within any conceived or expressed intention of the legislature, as was the case in Virginia. These provisos were brought into effect by the legislation of 1829. It was not by virtue of any express and particular language of the Legislature adopting this precise rule that these provisos could, in any event, be made applicable to personalty. The Legislature did nothing more than change the law of descents, *and the operation of a rule of law prescribed by the court* made this the rule for the distribution of the personalty. To my mind there is a manifest difference between following the express and positive precepts of a legislative enactment, as was the case in Virginia, and the controlling and restraining the operation of a rule announced by the court, in a case of doubt, by the nature of several subjects to which it was to be applied. The Legislature in Florida never de-

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clared in words that the rule of descents in operation when the distribution should happen should control distributions. The court announced this as the result, in its opinion, of the legislation upon the two subjects. It was absolutely necessary for the existence of any rule that it should so hold, because the statute of descents in operation when the act of distribution was passed, and in reference to which the Legislature acted, had been repealed, and unless the new rules of descent were held applicable, there was no rule, as there was no other law of descents. It was through the operation of this rule that these provisos were sought to be made applicable to distributions. The real effect of the decision of *Jones vs. Dexter* was, therefore, to control this rule (prescribed by the court in a case of doubt,) in its application, and not to over-ride or modify the letter of a statute passed by the Legislature in view of all the facts. The act of distributions in this State was passed by the Legislature when there was no distinction in the rule of descents to be applied to adults and infants. The same rule applied to each. That rule was based upon the general principle of regarding the person last seized or having title as the true owner, and as the person whose presumed affections were to be objects of the bounty of the statute. It rejected the principle of looking to the blood of the first purchaser, and did not, in the case of an infant, require the source from which the property came to be ascertained. Hence, so far as the *Legislature* has ever expressed any view upon this subject of distributions, it is that the rule governing in the case of adults should govern in the case of infants. This department of the government has never said that the exception as to the descent of an infant's realty should extend to the distribution of his personal property, and when we have seen the difficulty in the application of this rule, and its conflict with the general principle underlying the whole system, as I shall subsequently show, I do not believe it will ever prescribe such a rule.

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These differences in the precise character of the cases in Florida and Virginia become very important when we recollect the history of this legislation, the causes which prompted it, and the leading principle upon which is bottomed the system of descents and distributions, not only in Virginia but in this State, and a majority of the States of the Union. It cannot be doubted that a system of descents which was created to foster and perpetuate an aristocracy, itself an element of power in the government, is not suitable for a republic, in which the existence of such a privileged class is inconsistent with the essential principles upon which such a government is founded. While, therefore, upon the success of the American revolution it was entirely proper for the several States of the Union to adopt the principles and rules of the common law controlling ordinary commercial transactions between its citizens, it became the duty of their jurists and statesmen to devise a system of descents conforming to the genius of our government, and to abandon, in a great measure, rules obtaining in English, which were the off-spring of the feudal system, adopted at the behest of a landed aristocracy to perpetuate their wealth and preserve the privileges of their class.

In England, the canons of descent kept constantly in view the blood of the first purchaser. It was the fundamental principle of the law of collateral inheritances, that upon the failure of issue in the last proprietor, the estate should descend to the blood of the first purchaser. Our people, opposed to keeping up the wealth of families, to entails, and to primogeniture, adopted a system like that obtaining among the Jews, Greeks and Romans, disregarding, to a great extent, the source from which the land was derived, and based upon the idea that the person who died intestate and last seized of the estate, or had title thereto, was the absolute owner, and that his presumed affections should be consulted rather than the presumed desires of some remote ancestor who had first acquired the estate. The one system,

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looking to the desire of the first purchaser, and which obtained almost exclusively in England, designated as objects of its bounty those only whom he would naturally desire so to be, while the other, looking only to the person last seized or having title, would bestow the benefit according to his presumed natural affections. Hence, under the general rule of descents in Virginia and Florida, the mother and her descendants took an interest in the estate, though it was derived from the father, in the contingency that there was no issue or their descendants, or no father of the decedent living. In violation of this principle, upon which the whole system was founded, and in some cases palpably contrary to the natural affections of the person who last owned the estate, an exception was made in Virginia in the case of an infant decedent, and it was provided that his real estate, if derived from the father, should in no event go to the mother or her descendants. We thus see that this provision, even as to the descent of the realty of an infant, was in violation of the principle underlying the whole system, and while some good reason for a change may have existed, I certainly cannot conceive why the fact that a person is under twenty-one years of age should change the rule. It is well, when we consider the matter of distributions, to bear in mind that this exception, even as to the *real estate* of an infant, is contrary to the general principle of the legislation of these States, and that this general principle was established after the most mature consideration of the subject by the fathers of the republic. If we recollect that a majority of the court in Virginia failed to avoid the consequences of the rule they prescribed, for the reason that the letter of the statute was positive, and the intention of the Legislature was too plainly expressed to doubt, it is not a violent presumption to suppose that the court in Virginia, under the circumstances existing in Florida, would have made the same decision that was made in the case of Jones vs. Dexter in this State.

I would here leave this branch of the subject, but there is

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one matter which was urged so much in argument, and which is deemed so material by the court, that I feel constrained to say something. That is the difficulty of tracing personal property to the source from which it came, and the difference in this respect between land and chattels, which occasions the rejection of the provisos, which, when applied to personalty, would require chattels to be traced. The argument as well as the view of the court, in respect to this matter, is, that no such difficulty exists in tracing chattels as should justify the rejection of the provisions of the statute of descents which would require chattels to be traced. I think, if a case of this character is simply stated, its difficulty if not impossibility will be seen. Take the only case in which what is called the reciprocity of the statute could operate. An infant derives personalty from the father, and then derives personalty from the mother. This infant dies, having representatives both in the maternal and paternal lines. Recollecting that the rents, issues and profits of this property would not follow the rule prescribed for the corpus or principal, (1 Munf. 215,) but would follow the rule for adults, the general rule, there would be a necessity to ascertain what portion of the property consisted of the increase of animals and interest upon moneys. I think it is manifestly impossible to apply such a rule without great inconvenience. I cannot think it was the intention of the Legislation to adopt a rule which would require a guardian, in order to protect himself, in case his ward should die, to be able to identify the sheep, cattle and other animals derived from each parent, as well as the increase of each stock so derived from the original parent stocks, and to keep distinct accounts of the principal and interest of moneys, and what portion of the infant's expenses and necessary expenditures, in connection with the property, are paid from the interest of the one fund or the other, and so on. In a majority of cases, he would never be able to distinguish what portion of stock came from the one parent or the other, as the animals of this character,

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upon a farm, generally composed one flock and the increase bear one mark. In all cases where each parent had securities of like character, how would the source to which each remaining security belonged be ascertained, in the event a portion of them was destroyed by fire?

As remarked by Judge Roane, "chattels are of a fluctuating nature, the property of some consisting in their use and are not traceable, and, after a lapse of twenty-one years, great inconvenience as well as litigation would ensue from attempting it, while, on the contrary, land is permanent and indestructible, and can be traced *ad infinitum*." In every age and in every country, from the time that an exclusive right of property could be acquired, wherever there was a government to prescribe rules, these rules have recognized a difference between real and personal property. The common law, moulded, shaped and created from the feudal system, made differences in the acquisition, in the manner of enjoyment and the disposition of these two characters of property, and, in the nature of things, you cannot well make a general rule applicable to one applicable to the other. You should restrain and modify the rule according to the nature of the several subjects, unless the intention of the Legislature is otherwise clearly expressed. At common law, upon the marriage, the chattels of the wife vested absolutely in the husband. In this State, this rule was modified in 1845, and the wife's title to personal property here continues separate, independent and beyond the control of her husband, although she cannot sue her husband for the rents, issues and profits thereof. While this may permit what is called the reciprocity of the statute to operate at the present time more frequently, it is obvious that it increases the difficulty in enforcing the rule contended for, because, if the rule of the common law was operative, there would be, in all cases where the husband survived the wife, no necessity for such an inquiry, as the personal property would all belong to

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the husband. I remark just here that this change in the rule of the common law did not exist in 1828, when our statute of distributions was passed, or in 1829, when the act regulating descents was passed, and therefore it could not have affected the legislation of 1828 and '9.

Leaving the comparison of the cases in Virginia and Florida, I now come to the consideration of the present case.

This case is here under circumstances very different from those under which the case of Jones vs. Dexter was before this court in 1859. We are asked to overrule that case in so far as the court held that the provisos did not control in the distribution of an infant's chattels. Under what circumstances and for what reasons are we asked to reverse this decision? The case of Jones vs. Dexter is the only decision of that point ever made in this State by the Supreme Court, after argument and consideration. The matter involved was the construction of a statute, and the result of the decision was to establish a rule of property. Potent indeed must be the reasons to justify us in overruling such a decision, existing now for eleven years unassailed and unquestioned. It is urged, and it is true that the judgment rendered in this court in the case of Young's adm'r. vs. McKinnie's adm'r., 5 Fla., 542, covered the point, but the question decided in Jones vs. Dexter, and now involved ~~here~~, *was not argued, nor was the point even raised*. All of the authorities concur in the statement that a case, to become authority so that the rule *stare decisis* will apply, must not only involve the point, but the precise question must have been raised and determined upon consideration. It is also true, as is urged, that in 1845 one of the judges of the Circuit Court held that the terms, "the law regulating descents," used in the distribution act, "was such law regulating descents as might be in force when the contingency happened." This ruling is certainly not in conflict with the decision in Jones vs. Dexter, which states the same general rule for distributions. Whether the provisos as to the descent of an infant's realty shall

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apply in the distribution of his chattels was not considered, so far as we are advised, and if it had been considered and expressly determined, we could not accept the judgment of the Circuit Court as authority. The cases in Virginia, while entitled to great respect, are, as we have seen, different from this case, and even if they were identical, the doctrine of *stare decisis* could not be invoked here by a reference to them, as that doctrine is only applicable in its full extent and force within the territorial jurisdiction of the courts making the decisions. This doctrine is applicable in its full force and extent to the decision in *Jones vs. Dexter*. It is urged again, that it was the opinion of the bar for a series of years that the provisos controlled the distribution of an infant's chattels. I cannot say whether this is correct, but I can say that if the bar understood the matter and reflected upon it, it is about the only instance in which there was but one opinion among professional men upon a question of like character and surrounded with the same difficulties.—Where judges clothed with all their responsibilities entertain different opinions, it is not likely that the bar will agree.

If I concur with the majority of the court, I must therefore, upon these grounds, overrule a decision of this identical question, made eleven years ago by this tribunal, upon argument and after due consideration—a decision, too, construing a statute and establishing a rule of property. The effect of this decision is to declare that the rule announced in the case of *Jones vs. Dexter* never was law, and, in some cases, to unsettle estates which have been settled by the courts according to that rule. It also disappoints all testamentary dispositions of property which were affected by a knowledge of this rule and made in view of it.

The wife's personal property remaining under the provisions of our statutes her own, notwithstanding coverture, the case of a mother having infant children by two marriages and considerable personal property, is not a very rare one. Mothers in this situation have been justified in making

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testamentary dispositions of their property for eleven years past, in view of the rule that, in the event of the death of an infant child by the first marriage, the personal property it derived from its father would to some extent go to the children of the half blood surviving. We therefore disappoint dispositions based upon the devotion and affection of the mother to the child, the purest and most unselfish attachment that exists. I might multiply illustrations of this character, as it is almost impossible to estimate the results which follow the change of a rule of property, but it is unnecessary. *Stare decisis* is a safe and prudent maxim, and while in questions of practice and like matters we may, in cases of palpable absurdity accompanied with injurious results, reverse a rule, yet I cannot consent thus to act where, for eleven years, all classes have had a right to regulate their action and to be controlled in the disposition of their property by this rule, established by the highest tribunal in the State. It seems to me that the court which, for the equities of some individual case, reverses the rule to be applied to all cases, commits a much greater wrong by destroying all other settlements than it would in enforcing the rule in the one case, even if the original rule was wrong. To be controlled by the equities of the one case here, is in effect to do justice to one by doing great wrong to many, and I conceive that this cannot be correct either in morals or in law. Sir James Mansfield, (4 Bos. & Pul., 69,) speaking of this subject, says: "It is of greater consequence that the law should be uniform than that the equitable claim of an individual should be attended to." Whatever doubt I may have had on other branches of this case, I have had none here. What say the authorities in reference to overruling decisions of this character? It has been remarked that a court in deciding almost any question, "creates a moral power above itself." In a case before Lord Kenyon, (7 Term Repts., 242,) it was urged in argument that a certain doctrine in reference to the revocation of wills

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was not bottomed on reason, and that it would be absurd to permit it to prevail. His reply was simply that if such an observation was an answer to a rule of law, it might be applied with equal success to a variety of other instances; and in referring to some objections taken to a rule of descents which excluded persons of the half blood, he remarks that "it is sufficient in answer to objections to establish a rule of law of this kind to say, '*ita lex scripta est.*'"

The Earl of Lincoln's case (Show. Par. Cas. 154,) announced the rule of law, that where a man seized of an estate, makes his will, and devises it, and afterwards conveys it entirely away, though he takes it back by the same instrument, it is a revocation. Lord Mansfield, speaking of this rule, said that it was "not founded upon truly rational grounds and principles, nor upon the intent, but upon legal niceties and subtlety," but that it was so far established by the Earl of Lincoln's case, that it ought to be observed in future if a like case should happen. (2 Eng. Com. Law, 22.) Says he, we must not depart from it now, notwithstanding we would wish that no such rule had ever been established.

Lord Mansfield again says, (1 Burr. 419,) "when solemn determinations acquiesced in formed a rule of property, they ought, for the sake of certainty, to be observed as if they had originally constituted a part of the text of the statute." It is needless to multiply quotations upon this subject. The authorities, both in England and in this country, are almost without number, 7 T. Rep., 416; 3 Barn. and Ad. 17; 3 Bing. 558; 1 Kent, 476; 16 John. 402; 20 John. 722; 23 Wen. 340; 7 Mich. 12; 1 Yerg. 376; 5 N. Y. 389; 30 Miss. 246; 2 Burr. 787; 5 T. R., 450; Cooley's Con. Law, 52. In cases of this kind, where the original question was the construction of a statute fixing a rule of property, the remedy should be the enactment of a new rule by the Legislature, the effect of which would be to change the rule in future and thus avoid the serious consequences attending the unsettling of estates. We have seen that decisions of this kind will not

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either in England or America be overruled, even though the previous rule was such as we would wish had never been established. In this case we in effect abolish a rule approved, after mature reflection and examination, both by the Judiciary and Legislature of the State from which our statute upon the subject of descents was derived, and established, to operate both in the past and future, a rule which, after experiment, was disapproved by the same Judiciary, and which, at their request, (an unusual thing,) the Legislature promptly repealed. In addition to this, if it be true that the decision in *Jones vs. Dexter*, made eleven years ago, did not settle the law, then, applying this rule to this decision, it cannot settle it for the next eleven years. During this time, the lawyer who can give advice on this subject, or the citizen who can act with any certainty, must possess the power to unveil the future and know what will be our opinion or that of our successors at that remote date. It is with no pleasure that I differ with the majority of the Court in this case, but I cannot coincide with action involving such consequences.

JOSEPH H. ALSTON, *et al.*, APPELLANTS, VS. SARAH F. ROWLES, EXECUTRIX OF THE LAST WILL OF JOHN J. ROWLES, DECEASED, IN BEHALF OF, ETC., APPELLEES.

Where an appeal is prosecuted by the "defendants now living," omitting individual names, and by a person who purports to be the legal representative of one who was a party to the decree, and such legal representative was never made a party to the proceedings either in the court below or in this court, it must be dismissed. The legal representative in such case is in no condition to prosecute the appeal, and the terms "defendants now living" fail to identify with requisite certainty the individuals whose interests are to be affected, should the court act.

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Appeal from a decree of the Circuit Court for the Second Judicial Circuit in Leon County.

Sarah F. Rowles, the appellee here and the plaintiff below, filed her bill in behalf of herself and other judgment creditors of the estate of Robert H. Berry, deceased, alleging that her testator, John J. Rowles, and Robert H. Berry, in the year 185 , entered into a mercantile copartnership; that according to her information and belief the whole capital was contributed by her testator, Berry being insolvent and without means; that the parties carried on "a prosperous and successful business" up to the year 1855, when the firm was dissolved by the death of her testator, Rowles; that Berry, as surviving partner, claimed the right to wind up the affairs of the copartnership and to pay the debts of the firm, which, excepting the debt due her testator, she alleges were inconsiderable, as the business was conducted upon a cash basis; that she believes that the business was "wound up" by Berry in a short time; that she from time to time urged Berry to a settlement, which, after repeated solicitations, he made in the year 1861, when he gave to her, as executrix as aforesaid, his five several promissory notes for eight hundred dollars each. She alleges, upon information and belief, that this was the sum due Rowles by Berry at the date of the death of Rowles and the dissolution of the copartnership, viz: the year 1855; that sometime after this settlement Berry died intestate, and Richard Saunders, Sheriff of Leon county, became by virtue of his office his administrator; that she instituted suit against him as such administrator in Leon Circuit Court, obtaining in the fall of 1866 a judgment against him for the sum of \$7,152; that an execution has been issued upon this judgment and a return of *nulla bona* made. Plaintiff alleges that between January, 1856, and January, 1861, Berry purchased and paid for six hundred acres of land in Leon county, "and received and took and had recorded the title deeds in the name of his wife, Mary A. Berry;" that on the 31st

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of December, 1853, the said Berry purchased in the same way two lots in the city of Tallahassee, and that while the purchase was thus made anterior to the dissolution of the firm, yet that the purchase money was paid by Berry thereafter, at a time when he was indebted to his deceased partner; that Mary A. Berry died after R. H. Berry and after the year 1860, leaving, surviving, her one child, Annie, the wife of defendant, J. H. Alston, and that Richard Saunders, Sheriff as aforesaid, became her administrator by virtue of his office.

Plaintiff further alleges that Alfred Barco, a creditor of Mrs. Berry, sued Richard Saunders, Sheriff and her administrator, and obtained a judgment for the sum of \$941.46; that a fi. fa. was issued upon said judgment, which has been levied by defendant, J. C. May, Coroner, upon the lots purchased by Berry in the year 1853 and the property advertised for sale. The prayer of the bill is that the sale under the fi. fa. may be enjoined; that the deeds to the wife may be set aside as voluntary and fraudulent; that the property may be declared to be assets of R. H. Berry, subject to the judgment of the plaintiff, and that the same may be decreed to be sold and the proceeds applied to plaintiff's judgment.

The answer admit the formation of the copartnership and its dissolution as stated; denies Berry's insolvency at the time the copartnership was entered into, and alleges upon information that the capital was mainly contributed by Berry, Rowles being engaged for his business capacity; admits that Berry closed the business up; alleges that Rowles kept the books and money of the firm; that Berry was much perplexed in closing the accounts, and denies that there was any unnecessary delay. Defendants, upon information, expressly deny that Berry's indebtedness accrued before or was due at the time of the death of Rowles, and expressly affirm that all the property was purchased by Mrs. Berry. Plaintiff files replication, and evidence being taken

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by the parties, after hearing, a decree was passed granting the relief asked.

This appeal is prosecuted from this decree.

As the case in this court is disposed of without a consideration of the evidence in the cause, or the merits of the cause, a statement of the evidence is omitted.

S. J. Douglas, for Appellants.

R. B. Hilton, for Appellees.

WESTCOTT, J., delivered the opinion of the Court.

This is a suit between judgment creditors of the administrator of the husband as plaintiffs, and a judgment creditor of the administrator of the wife, the heirs and distributees of both husband and wife, and the executive officer of the court who levied a fi. fa. of the creditor of the wife upon the property in dispute, as defendants.

It is alleged by plaintiffs that the husband having purchased this property in his life-time, caused deeds of conveyance of the same to be made to the wife. The bill seeks to enjoin the judgment creditor of the administrator of the wife, who had caused the coroner, the sheriff being disqualified, to levy upon a part of this property, from selling the same, alleging that the property was the subject of a voluntary conveyance between husband and wife when the husband was indebted, and it seeks to subject the property to sale, to satisfy the judgments against the administrator of the husband, rather than the judgments against the administrator of the wife. The relief prayed was granted, the property was directed to be sold, and the proceeds applied to the claim of the judgment creditor of the administrator of the husband who brings the suit. From this decree, this appeal is prosecuted by Herndon L. Henderson, administrator de bonis non of Thomas Gaskins, deceased, and the "defendants now living," without naming the surviving defen-

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dants. The record discloses that Henderson was not a party to the decree in the court below, and he has not been made a party pending the appeal. Hence he is no party here, and cannot prosecute an appeal. The general rule is, that upon the death of a defendant materially interested, unless his interest or liability survived to or devolved upon a co-defendant, or the interest of the party dying so determines that it can no longer affect the suit, the suit abates, and in all cases it abates, to the extent of his interest or liability. If the death occurred anterior to the appeal, the remedy for the abatement is in the original jurisdiction. If the death occurred pending the appeal, the remedy is in the appellate court, under the rules of this court.

Upon this record and for the purpose of this proceeding, the presumption is that all the parties were alive at the date of the decree. There is no suggestion of death in the record. Everything is regular, and although the fact may be that the parties died before decree, yet we cannot in this proceeding hear a suggestion of that fact against the record. In such a case, where, from the subsequent proceedings had in prosecuting the appeal, it is apparent that the death of some of the parties has occurred, the presumption is that the death occurred after decree. Were it apparent from the record that a decree had been made in the absence of necessary parties, the usual practice in the United States is for the appellate court to reverse the decree, and to remand the case with directions or leave to make proper parties. (7 Cranch, 97.)

The question here, so far as the administrator de bonis non of Gaskins is concerned, is what course must we pursue where the death of one of the defendants has occurred after decree, and the legal representative, without reviving the suit, enters an appeal to this court. Can the representative of a deceased defendant, without any proceeding making him a party in the original jurisdiction, enter an appeal and bring the case to this court for review? The suit, by the

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death of this party defendant, abates as to him at least, and unless, under the rules of chancery practice obtaining in this State, the legal representative can revive it by simply entering an appeal, then he is here no party, and as to him there is no appeal which we can hear. Where the suit abates by death of a defendant, the general rule is that anterior to decree, the defendant cannot become an actor to revive it. (Daniel Chy. Prac., 1616.) After decree, the case is different, and the suit may be revived at the instance of a defendant in case of the death of plaintiff, or at the instance of those who succeed to the rights of the defendant in case of the death of the defendant, whenever the defendant or those who represent him can derive a benefit from further proceedings. (Daniel Chy. Prac., 1601, 1615, 1616, 1617; Story's Eq. Pldg., 372; Mit. Chy. Pldg., 79; 10 Ves., 401.) The defendant's representatives having therefore a right to revive where the suit abates by the death of the defendant after decree, the question is, can he revive the suit by simply entering an appeal? There is no such practice in the English Courts, and in the absence of statutory regulations we must look to the rules of practice in equity in the circuit courts of the United States, which are the rules of practice prescribed by this court for the circuit courts of this State. Rule 56 of the rules of practice in that court provides, "that whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor, or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same." We know of no authority which would authorize the administrator of a defendant dying after final decree to prosecute an appeal without reviving the suit. The English practice is to revive first and make the representatives parties to the appeal. (2 Dan'l Chy. Prac., 1582.)

What we have said refers only to the standing of the administrator de bonis non of Gaskins in this court. This is

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not the only defect, however. The appeal is prosecuted by the administrator de bonis non of Gaskins and the "defendants now living," without naming them. We are entirely unadvised as to who the defendants living are, and as a matter of course equally unadvised who are dead. Whoever they may be, we know the suit has not been revised so as to make those persons who succeed to their rights parties. The result is, that not only is Henderson, the administrator de bonis non of Gaskins, in no position to prosecute an appeal, but the same is true with reference to the representatives of the deceased defendants, and who either the deceased defendants or the surviving defendants are, we cannot determine from the record.

Can we hear an appeal unless the record discloses the persons whose interests and property our decree is to affect? We cannot thus enter judgments. It may be that the defendants living were the coroner and heirs at law of the husband and wife. If this be so, the coroner being the executive officer of the court to conduct the sale under the judgments at law, is brought into the court of equity so that *his acts* may be controlled rather than to affect any interest he has in the subject matter of the suit. We do not think this officer a necessary or a proper party. In this aspect of the case, it would be very doubtful, too, whether the heirs at law of the husband and wife are necessary parties in a case of this kind, real estate being under our statute assets in the hands of executors or administrators equally liable with personal property to an execution against the executor or administrator. (2 Cranch, 407.)

If this should be so, how could this court make any order affecting the estates of the deceased wife or husband without their administrators are parties, and when no legal representative of their's is before the court? In such an event, the court could make no order affecting the decree in this case which would not necessarily affect their estates, as real estate, which the plaintiff alleges belongs to the estate of the

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husband, and which the defendants allege belongs to the estate of the wife, is the subject of the suit, and to which estate it belongs is the material question involved in this contest between creditors of the husband and a creditor of the wife.

Herndon L. Henderson, administrator de bonis non of Thomas Gaskins, deceased, never was in a situation to prosecute this appeal. The failure to state the names of the parties defendants living at the date of the entry of the appeal, renders the record so defective for want of certainty as to the parties that are prosecuting the appeal, (it being prosecuted by the "defendants now living.") that any order made by the court would be made in a case where we were totally unadvised by the record as to the individuals it would affect.

The appeal is dismissed.

JOSEPH H. ALSTON, *et al.*, APPELLANTS, VS. SARAH F. ROWLES, EXECUTRIX OF THE LAST WILL OF JOHN J. ROWLES, DECEASED, IN BEHALF OF, ETC., APPELLEES.

1. Where property is purchased and paid for by the husband, and a deed is taken in the name of the wife, such acts coupled with an existing indebtedness of the husband make a *prima facie* case of fraud. In such case the creditor can follow the funds of the debtor and subject the property in the hands of the wife or her legal representatives, unless the presumption of fraud is negated by the condition of the debtor and his circumstances at the time, or other rebutting evidence.
2. The rule at common law is that the goods and personal chattels of the wife, which were actually beneficially possessed by her in her own right at the time of her marriage, and such other goods and personal chattels as come to her during coverture, vest absolutely in the husband. The separate property of the wife is that of which she has the exclusive

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control, independent of her husband, and the proceeds of which she may dispose of as she pleases.

3. Where a gift of personal property to the wife during coverture is established, it is presumed, in the absence of testimony to the contrary, to be a gift as her general and not her separate property. In a contest between creditors of the husband and creditors of the wife, it devolves upon the creditors of the wife seeking to establish a separate estate in property acquired prior to 1845, to show that the gift was accompanied by some instrument or unequivocal declaration to the effect that it was to and for the separate use of the wife, free from the control of the husband.
4. Where a husband purchases real estate, taking the deed in the name of his wife, his declaration that the purchase is made as the agent of his wife, and the money paid is his wife's, is not sufficient to establish a purchase with funds belonging to the separate estate of the wife.
5. *Held*, (by a majority of the Court,) that the representatives of a deceased partner stand in the relation of a creditor of the surviving partner, who assumes control of the partnership effects, to the extent of the value of the interest of the deceased partner after satisfying the partnership debts; and the doctrine that a voluntary gift or conveyance, or a voluntary post-nuptial settlement by a person indebted, is *prima facie* fraudulent as to the creditors of the debtor, applies as well in behalf of the representatives of the deceased partner, as in behalf of general creditors.

This is another appeal in the preceding case prosecuted by the defendants in the circuit court. The first appeal being dismissed, the suit was subsequently revived in the circuit court by the legal representatives of the deceased defendants. There being no amendment of the pleadings, the case brought up by this appeal is identical with that brought by the previous appeal, so far as the issues are concerned. There was additional testimony taken in the circuit court upon the revival of the suit. All of the testimony pertinent to the several issues raised by the bill and answer is stated by the court in its determination of the issues in the order in which they are considered.

S. J. Douglas, for Appellants.

The evidence in this case shows that Mary Berry had, during the coverture, made large sums of money by her in-

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dividual exertions and industry as milliner and mantua-maker. It further shows that she received from Lowell Holbrook a large amount of property as a gift to her separate use.

It is contended by appellants that this property was protected by the laws of this State from the marital rights of the husband while alive, and from his creditors after his death, and that in a court of equity the husband would be held to be the trustee of the wife. 2 Fonbl. Eq., book 1., ch. 2, sec. 6, note a; 2 Roper on husband and wife, ch. 18, p. 151 to 157; 9 Vesey, jr., 583; 2 Roper on Legacies, (by White) ch. 21, sec. 5, p. 370; 2 Pr. Wm., 316; 1 Atk. Rep., 270; 3 John. Ch. Rep., 540.

In such cases, the husband will be held trustee for the wife, although the agreement is made between *him and her alone*, and the trust will attach and be enforced in the same manner and under the same circumstances that it would be if he were a mere stranger. 2 Kent's Com., 146; 8 Yer. Rep., 33; 2 Carr & Payne, 62; 4 Myl. & Cr., 408; 4 Mason's C. C., 455; 4 McCord Rep., 452; 3 Gill & John. Rep., 504; 10 Pet. Sup. Ct. Rep., 583.

By the statute laws of this State, a married woman may acquire a separate estate, both real and personal, during coverture, by bequest, demise, gift, purchase, &c., and it is protected from the marital rights of the husband and the claims of the creditors, if an inventory thereof be made and recorded within six months from the time the title vests in her; and the registration of the deed of real estate is a compliance with the requirements of the statute. 5 Fla., 279. The presumption of law, in the absence of proof to the contrary, is that the purchase money was paid by the party to whom the title was made.

The appellants contend that a *gift* from husband to wife during coverture is good and valid, and will be supported as a post-nuptial settlement, without the intervention of a trustee, if it be not prejudicial to the rights of creditors.

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In order to invalidate a *gift* from the husband to the wife, made during the coverture, on the ground that it was *voluntary*, the bill must not only allege that the husband was indebted at the time of the gift, but the *proofs* must not only establish this fact, but also the further fact that the husband had not at the time of the gift sufficient remaining property to pay and discharge his then indebtedness. 2 Douglas' Mich. Rep., 326.

The circumstance that the property thus conveyed to the wife constituted a large portion of the estate of the grantor, but that he *failed* within a short period after the date of the conveyance, may awaken suspicion and strengthen other circumstances, but taken *alone* is not proof of fraud. 8 Wall. Sup. Ct. Rep., 370; 5 Wheat. Sup. Ct. Rep., 229; 5 Pet. Cond. Rep., 419; 2 Bro. Ch. Cases, 90; 5 Vesey, jr., 384; 1 Swanst. Rep., 106; 8 Vesey, jr., 199; 3 Barn. & Adol., 362.

In this last case it was held by the Judges "that a party must be *indebted* to the *extent of insolvency* to render his conveyance or gift fraudulent, within the statute of 13th Elizabeth."

The appellants contend that as Mrs. Berry, in whom the legal title was vested, was permitted to remain in undisputed possession for a long time after the death of Rowles, the partner of Berry, and to obtain credit upon the faith of being the *bona fide* owner, and judgments have been obtained against her estate and executions issued thereon and levied upon the property in controversy, a court of equity will not disturb the *rights and liens* thus acquired, and which have attached to the property, in aid of a creditor who has slumbered on his rights. 12 John. Rep., 553; 6 B. Monroe, 20.

R. B. Hilton, for Appellee.

At common law, chattels, personal of the wife at the time of marriage, or such as are given to her afterwards, becom

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the absolute property of the husband. This rule is applicable in this State to all such acquisitions anterior to 1845. Williams on Personal Property, 302; 8 Fla., 107. The earnings of the wife are in general the property of the husband. 1 Parsons on Contrts., 286; 2 Casey, 379; Story Eq. Jur., 387.

Where a purchase of property by a married woman is alleged in a contest with her husband's creditors, the burden is on her to prove that she paid for it with funds which were not furnished by her husband. In the absence of clear proof that she paid for it with separate funds, the presumption is a violent one that the husband furnished the means for paying for it. 5 Fla., 278, 437; 8 Fla., 142; 9 Harr., 355; 18 Penn., —; 35 Penn., 375; 43 Penn., 363; 44 Penn., 307; 36 Penn., 410.

The purchase must be made with separate funds, with such funds as at common law did not become the property of the husband, in order to protect the property from the claims of the husband's creditors. Real estate purchased with the earnings of the wife's labor during coverture, is subject to claims of husband's creditors. She holds it as trustee for the husband's creditors. 15 Iowa, 502; 17 Iowa, 510; 24 Texas, 611.

There is no evidence to establish a separate property of Mrs. Berry in any property. The purchase money could therefore never have been separate funds.

The testimony of the witness, Flagg, and of H. H. Berry, is excepted to as clearly irrelevant. They undertake to say, in answer to a *leading* interrogatory to that effect, in which the word is put to their mouths, that Holbrook gave to Mrs. Berry "*separate*" property. This is of course a conclusion of law, and the interrogatory was objected to on that ground. Before the court can determine whether the property given was Mrs. Berry's *separate* property, it must know the terms and words of the gift. As Berry's debts had then been

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wiped out by his discharge in bankruptcy, there was no reason why Holbrook should have conveyed property to Mrs. Berry, so as to make it "separate" property, for Berry then had no debts to which it could be subject. But inasmuch as there was no record of the property, it and its proceeds became of course subject to Berry's subsequent debts, even if given as his wife's separate property. (But I ask, was there ever before an effort made to establish a gift of separate property by parol proof of a parol gift?) Nor is there a scintilla of evidence that the hires of these slaves were applied to the purchase of the real estate in controversy. As it appears from the proof, that Berry and wife lived in considerable style, with their carriage and horses and driver, it must have required much more than the earnings of these slaves to support them in such extravagance.

It is impossible to maintain, under the proofs in the case, that R. H. Berry, at the date of either purchase, was in a condition to make a *valid* voluntary settlement upon his wife. His condition was that of permanent bankruptcy and insolvency. Flagg, one of the witnesses on the other side, says that he "knows that Berry had no means of his own with which to purchase property." In other words, that he was insolvent at the time of these purchases. The plantation, it will be remembered, was actually purchased after the death of Rowles, and after the accrual of Berry's indebtedness to him; and then bought on a credit. The town lots, though bought on the last day of the year 1853, were likewise bought on a long credit, and not paid for until after the death of Rowles. The mortgage to secure the purchase money was not satisfied until January 14, 1856, Rowles having died the previous fall. Johnson testifies actually that he was paid in part with goods from Berry's store. If so, he was paid after Rowles' death, for before that time the store was that of Berry & Rowles, not of Berry. Besides, we are bound to believe that as between two men, both of limited circumstances, like Berry and Rowles, the large in-

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debtedness witnessed by the promissory notes given by Berry to Mrs. Rowles, as executrix, and growing out of their co-partnership, could not have had its origin within the few months which elapsed between the date of the falling due of the first note to Johnson and the death of Rowles. The debt had probably been running up during the whole term of the co-partnership. The money and goods which paid for both the town lots and the plantation were rightfully the property of Rowles, and should have been applied to the payment of the debt due him. But inasmuch as they were not so applied, but were applied to the payment for the real estate bought in the name of Mrs. Berry, a court of equity will so apply that property.

I feel therefore authorized in maintaining and asserting, with the utmost confidence, as alleged in the bill, not denied in the answers and conclusively established by the circumstances of the case, that this was a subsisting indebtedness at the date of the death of Rowles, and much of it doubtless accrued earlier.

But on legal principles it is impossible to escape this conclusion. Strictly and correctly speaking, as remarked by the Supreme Court of Georgia, in *Hammond vs. Hammond*, 20 Ga., p. 556, in a suit of one partner against another, after dissolution, for debt due growing out of the copartnership transactions, the claim was not so much for indebtedness due from one partner to the other, as for indebtedness from the *copartnership* to the *creditor partner*. This being so, how can it be contended that this indebtedness to Rowles accrued or could have accrued after the death of Rowles? Was it ever held or imagined that a copartnership could create or contract indebtedness after its dissolution?

Accordingly, it has been held in North Carolina, 6 Jones E., 124, (cited in U. S. Digest, vol. 19, p. 351,) that "Upon the death of one of the members of a copartnership, the statute of limitation begins to run in favor of his personal

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representatives against a claim to have an account of profits received by him."

The judgment creditors of the wife in this case claim that even if it be admitted that the purchase money for this property was paid by the husband, yet their equity as creditors of the wife is equal at least to the equity of the creditors of the husband. The legal title they say being, during the whole time in the wife, they had a right to extend credit on the basis of that title; that they have at least an equal equity, and their diligence at law should not be rendered fruitless.

In reply: The property purchased in this case being paid for with the husband's money, who holds it as a trustee for her husband's creditors, (15 Iowa, 502,) her creditors can claim only such titles and interest therein as she herself had. The claim of the judgment creditor of the wife is subordinate to the claim of the creditors of the husband, whose trustee she is. 1 Am. Law Reg., 105; 11 Barb., 494; 1 Paige, 280; 4 Paige, 14; Adams Eq., 149; 2 Rich. Eq., 179; 10 Mich., 344; 1 Barr., 493; 2 Kan., 236; 15 Ark., 94; 2 Leading Cas. in Eq., 75; 7 Wall., 205; 1 Hare, 501; 3 Hare, 416, 424.

WESTCOTT, J., delivered the following opinion:

The property in dispute here is six hundred acres of land in Leon county and certain town lots in the City of Tallahassee. The conveyances to this property are in the name of the wife. Appellee, a creditor of the husband, claims that the consideration for the purchase of this property was the money of the husband; that her testator was a creditor of the husband at the time of the purchase or when the property was paid for by him; and that in either event, under the circumstances of the case, it should be declared assets in the hands of the husband's administrator, to be applied to the payment of his debts. The legal title to this

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specific property was never in the husband. This, however, when considered with reference to the rights of the creditors of the husband as against the administrator of the wife, is not in all cases an answer to the demand of the creditor; if it were, the husband by this simple device would be enabled to settle upon his wife or his children the whole of his estate at the expense of his creditors. If this property was purchased with the funds of the husband, it is no sufficient answer to a creditor to say that it was conveyed to his wife. The general rule in equity is, that the property is as to his creditors, to the extent that he paid the purchase money, his property, for although it may be a *purchase*, and not strictly within the statute as to fraudulent conveyances, yet at common law, a person could not use funds which ought to be appropriated to his creditors in securing an estate for his wife or children. In such a case the creditor has a right in equity to follow the funds of the debtor. 1 Dev. & Bat., 569; 1 Ired., 559.

The first question therefore presented for our consideration is one of fact. Did the purchase money for this property proceed from the husband? Was it his? After a most careful consideration of the evidence in the record, it is our conclusion that nothing as to this point is established except that the husband paid the money for all of this property, alleging at the time that he paid the money, that it was his wife's and that he made purchase as the agent of his wife. The argument of the administrator of the wife and the creditor of the wife is, that it is established by the evidence that at the time of these payments, she had separate property in the custody and control of the husband, which was more than sufficient to pay the purchase money, and that when this is the case, the declaration of the husband made at the time of the purchase to the effect that he purchased with her funds, together with the fact that the deed is in her name, should make a *prima facie* case in favor of those who claim through her. It will be unnecessary to state

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the rule under these circumstances, unless the evidence discloses a separate property in the wife at this time.

It is in proof that the wife carried on a millinery business in her own name in 1844 or '45, and perhaps in the years 1846 and '47. This business the witnesses think was profitable. There is nothing in the record which connects the profits of this business with the purchase money. The purchase was made ten years after this business ceased, and only a part of the price was paid in cash. The amount of these earnings is not shown, nor does it appear that any of these moneys ever reached the hands of the husband. Our conclusion is that the evidence fails entirely to connect these earnings with the purchase money of this property. No question of law arises therefore in reference to them. It is unnecessary to determine whether the earnings of the wife under these circumstances remained her's, or whether they became her husband's. The only other source from which it is claimed that the wife derived a separate property was through a gift of personal property by Lowell Holbrook in 1841 or 1842. At this time the common law prevailed in this State. At common law the property of the wife was divided into two general classes: her general property, and her separate estate. The great difficulty in this matter is not as to the rules of law applicable to each class—they are well settled and defined. The difficulty is in determining to which class any particular piece of property may belong. The goods and personal chattels of the wife, which were actually beneficially possessed by her in her own right, at the time of her marriage, and such other goods and personal chattels as came to her during her coverture, belong to the first class, and these at common law vested absolutely in the husband. The separate property of the wife is that of which she has the exclusive control, independent of her husband, and the proceeds of which she may dispose of as she pleases. A gift of personal property during coverture to the wife is presumed, in the absence of testimony to the contrary, to be

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a gift as her general property. Whenever it is separate estate, that character must be imparted to it by the instrument or title by which it is held, and in this case it devolves upon the parties who seek to establish a separate estate in a contest with the husband's creditors, to show that the gift was accompanied by some instrument or unequivocal declaration, to the effect that it was to and for her own separate use, free from the control of the husband. In the language of Judge Story, the purpose must clearly appear beyond any reasonable doubt, otherwise the husband will retain his ordinary legal and marital rights over it.

The witness, Berry, testifies that he knows that the slaves were bought by Mr. Holbrook and given to Mrs. Berry. The witness, Flagg, testifies that he knew the slaves were bought in the manner stated, and that Mr. Holbrook presented them to Mrs. Berry "as her own separate property." These answers are in response to this interrogatory: "Do you or not know that Mrs. Berry had a separate estate of her own in certain property, and if so, of what did it consist?" Upon the cross-examination these witnesses are asked: "How do you know these slaves were the separate estate?" The answer of one of the witnesses is: "I know that the slaves were bought by Mr. Holbrook and given to Mrs. Berry," and the answer of the other is: "I know that Holbrook did not buy them to hold them, but only for the purpose of presenting them to Mrs. Berry. I know that the slaves were given to her, and supposed they remained her own separate property, as I never heard that she conveyed them to her husband or to any one else."

The direct examination seems to refer the question of law as to whether this was the general or separate estate of the wife to the witnesses, and their answer, that it was given as separate estate, is nothing more than an opinion of the witnesses upon a question of law, the witness at the same time saying nothing by which it is made to appear that the gift was accompanied by any instrument or unequivocal decla-

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ration, to the effect that it was to and for the separate use of the wife, free from the control of the husband. Not only is this true, but the cross-examination discloses that these witnesses knew nothing more of the gift but the fact that it was made by Mr. Holbrook to Mrs. Berry as her property, and the facts they state are not such as show that it was free from the marital rights of the husband. The rule as to the evidence necessary to establish a separate property in the wife, so far as here involved, is very clearly stated in the case of *Mews vs. Mews*, 21 Eng. L. & E., 556, and in *Quigly vs. Graham*, 18 Ohio State, 46. The opinion of these witnesses upon a question of law amounts to nothing, especially when it is a question which has given rise to many nice distinctions and discriminations, both in England and the United States. In this State, the question whether a particular piece of property belongs to the general or separate estate of the wife has frequently come before the courts, and in this court has been the occasion of much difference of opinion. This property belonged to the husband and not to the wife, and the result is that the evidence fails to establish any separate estate in the wife at the time of the purchase of and payment for this property. With this view of the evidence, there is nothing left to sustain the hypothesis of a purchase with separate funds but the simple declaration of the husband, that he purchased the property for his wife and with her money. This is so clearly insufficient to establish a purchase with separate funds, that we deem it unnecessary to resort to a citation of authorities to sustain our conclusion. We will remark, however, that the careful examination which we have given shows that in most of the States a great degree of strictness prevails. The law prefers the claims of creditors to those of a wife, resulting from simple love and affection, and in carrying out this policy the courts are very strict, requiring in all cases that the right of the wife shall be made out by proof of the most unquestionable character. The result is, that this is a case where the hus-

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band purchases, property taking the conveyance in the name of his wife. As between the husband and the wife, under the circumstances, it must be regarded as a post-nuptial settlement, based upon the consideration of love and affection. It would never be held that a trust resulted to the husband; such was not the intention of the parties. It is a gift to the wife. 10 Ves., 367.

We now reach the principal question in the case: Is this a voluntary post-nuptial settlement which can be sustained against the claim of the appellee, or is it a settlement made under such circumstances as requires a Court of Equity to set it aside, and declare the property subject to the claims of the creditor?

Appellee claims that her testator was a creditor at the time of the payments made by the husband for this property. It is unnecessary to state the rule applicable to such a case, until we determine whether she was a creditor. Had this been a conveyance, would it have been void under the statute? The language of the statute as to fraudulent conveyances is, that such deeds, made with the intent to hinder, delay or defraud "creditors or others of their just and lawful actions, suits, debts, accounts, damages, demands, penalties or forfeitures, shall be from henceforth as against the persons or body politic or corporate, his, her or their heirs, successors, executors, administrators and assigns, and every of them so intended to be delayed, &c., deemed, held, adjudged, and taken to be utterly void, frustrate, and of none effect." Lord Mansfield has said of this statute, that it could not receive "too liberal a construction or be too much extended in suppression of fraud," (2 Cowp., 432,) and the courts both in England and the United States have given a most liberal construction to the term "creditors" in the statute. The relation of creditor and debtor, within the meaning of this statute, has been assigned to cases in which there was nothing more than a contingent liability arising from express contract, and to cases where, at the time of the

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conveyance, at present right of action did not exist in the party assailing the conveyance. A guarantor upon a covenant before breach of the covenants, a co-obligor before breach of the condition of the obligation, a guarantor before failure to comply with the contract, a surety as against a co-surety before default in payment by the principal—all of these are cases in which the liability arises from express contract, and are cases in which the parties are assigned the position of creditors for the purpose of setting aside voluntary conveyances. Whenever such a claim is reduced to judgment, the courts will not sustain a conveyance made between the execution of such contract and the time at which a right of action accrues, upon the ground that the liability was contingent. 27 Maine, 539; 8 N. H., 44; 18 John., 427; 4 Bibb, 165; 5 Cow., 67; 8 Cow., 429. We have a case of this kind in this State, and there is a case involving the same principle in the Supreme Court of the United States. (4 Fla., 223; 7 How., 229.) The Supreme Court of the United States in this case remark, that a contingent debt is both in principle and precedent enough to furnish a motive to make a fraudulent conveyance to hinder or avoid its ultimate payment, and this may be presumed to have been done, providing circumstances exist indicative of fraud. Admitting, for the sake of argument, that a person who would be entitled to the protection of the statute in the case of a conveyance, would be allowed to follow the funds in case of a purchase, I enquire: What are the precise facts as to the acquisition of the property and the indebtedness of the husband in this case?

The lots in Tallahassee were purchased in December, 1853. The bill alleges that the payments were made after the death of Rowles, which happened in the year 1855. The answers of the administrator of the wife and the administrator of the husband, (parties not having any personal knowledge of the matters alleged,) simply deny all the allegations of the bill. The proof is first a mortgage of the lots

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to the original owner. (Johnson,) dated 31st Dec., 1853, executed by the husband and wife, and reciting a consideration of two thousand dollars. The mortgage deed is conditioned upon the payment of two promissory notes for the sum of one thousand dollars each, with interest from the first day of January, 1853; one payable on the first day of January, 1855. It will be noticed that the date at which the other note is payable is not disclosed, and that both notes bear interest from January, 1853. An entry of the satisfaction of this mortgage is made upon the records of the county of Leon on the 14th of January, 1856. The testimony of Johnson is the only other part of the proof having reference to this property. He does not recollect to whom the deed was made, or the price or the date of the sale. He says the lots were sold for cash, and that he took "a portion of the price in provisions from the store of Berry," but does not recollect anything about the dates at which payment was made.

As to the six hundred acres of land the proof is thus: There is a mortgage to E. Houstoun, adm'r, executed by the husband and wife in April, 1856, to secure a promissory note of that date, given by the husband, the wife, and J. H. Alston, for the sum of \$2,008, payable January 1, 1857.

The witness, Houstoun, from whom this land was purchased, testifies, that a part of the purchase money was paid in cash, the balance in sundry payments, and that probably part of the amount was taken out in goods. We know nothing of the amount paid for this land beyond what is stated, nor can we ascertain with any certainty the date of payment. The land was paid for, however, and in the absence of testimony, the presumption is that the note was paid upon the first of January, 1857, when it became due. Having fixed the date at which the last payment was made, and stated all the evidence in reference to each purchase, it remains to determine whether Rowles or his executrix is shown by the testimony to occupy at this date the position

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of an existing creditor. What is the evidence upon this subject? The notes given by Berry are dated the 8th of January, 1861. They represented an indebtedness from Berry to the estate of Rowles, which grew out of a partnership existing between them from 1850 to 1855. The partnership was dissolved in 1855 by the death of Rowles, and Berry, as surviving partner, controlled the business for the purpose of winding it up. The bill alleges, upon information and belief, that this indebtedness existed at the time of Rowles' death. The answer of the heirs at law and the creditors of the wife denies, upon information and belief, this allegation, and the answer of the legal representative of the husband and the wife deny it in general terms. The partnership business, the bill alleges, was profitable. Such is also the testimony of the witness Meginniss, who seems to have derived his information from a somewhat intimate knowledge of the business, and from a conversation with one of its members. There is a conflict in respect to this matter in the testimony of the witnesses, Flagg and Meginniss, but the case made by the bill agrees with the testimony of Meginniss, and a careful examination of his testimony, and a comparison of it with that of the other witness, shows that his knowledge of the entire transaction is greater, more definite and certain. This is all the testimony that has a bearing on the point. The substance of all may be briefly stated thus: A copartnership, which does a profitable business, is formed in 1850; it continues until 1855, when it is dissolved by the death of Rowles. Berry winds up the business as surviving partner, and in 1861 gives to the executrix of Rowles notes for \$4,000. It is admitted that the indebtedness grew out of the partnership business. Do these facts make the executrix of the deceased partner a creditor of Berry in 1857, (the time at which the last payment was made,) a period four years before the date of the note? To prove this allegation devolves upon the complainant. A complainant seeking relief in a Court of Equity must, by

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his evidence, produce that degree of certainty based upon appropriate evidence, either positive or circumstantial, which creates a moral conviction in the mind of the court that the facts are as he alleges, or he cannot have the relief he asks. This is the rule announced by this court on two occasions. 7 Fla., 144; 12 Fla., 388. It should certainly be applicable to this case, where the fact to be proved is to create a *prima facie* case of fraud. That the business was profitable would be reason why there would be no necessity for either of the partners to owe each other, either during the copartnership or after dissolution. Berry, the surviving partner, was, at the date of the last payment, *simply in possession of the assets of the late firm, winding it up*. He continued in possession during four years afterwards, when the notes were given. The answer expressly affirms that there was no unnecessary delay on the part of the surviving partner in winding up the affairs of the copartnership and settling with complainant, *and denies upon information an indebtedness at the death of Rowles*. Berry might have been a creditor of the estate of Rowles in 1857 instead of its debtor, and such relation would *have been consistent with the answer, and not inconsistent with the evidence*. In an account stated between him and the representative of the deceased partner at this time, he would not have been chargeable with either the goods on hand or the assets of the firm in his hands, not converted to his own use. The legal title had simply survived to him; his duty was to apply the joint effect to the joint debts, and divide the surplus with the representative of the deceased partner. I cannot in this state of the pleadings and evidence presume an indebtedness at a given time from a possession of assets by a surviving partner at that time, and for four years afterwards. Suppose that Berry was in possession of these goods as a trustee, the conditions of the trust being similar to his legal duties as a surviving partner, would the proof of a debt arising from the trust, admitted by him in 1861, establish a violation of his trust in

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1857? At the dissolution of the firm, for aught that appears, Rowles might have been indebted to Berry upon an account stated, and the indebtedness of Berry might not have accrued until 1859 or '60. It might readily have accrued then by his appropriating the whole of a collection, amounting to \$8,000, and charging himself in his account as surviving partner with the whole of this sum. The representative of the partner Rowles could have had an account at any time after dissolution, and the court in this case would have afforded every facility in its power and known to its practice to have ascertained the date of this indebtedness. There has been a delay of over ten years from the dissolution of the firm and the date of the deeds.

The right to have an account upon dissolution is a common right. It belongs to the surviving partner, as well as the representative of the deceased partner. If this simple right, independent of the state of the account or the question of indebtedness, is something which makes a *prima facie* case of fraud at common law or under the statute, then neither party could make a purchase of property for a wife or child, or voluntary conveyance; either of the parties may be a defendant to a bill for an account. Each of them has this equity; but upon which the liability rests, in order to make a voluntary settlement *prima facie* fraudulent under the statute, depends upon the state of the account, the question of actual indebtedness, and not upon the mere duty to account. The mere duty to account, independent of the question of indebtedness, cannot give a motive to defeat the claims of creditors. It is the indebtedness or liability, contingent or fixed, which, in contemplation of law, is the basis of the presumption of fraud. If a partner is liable, whether it be to a joint creditor or to his copartner, his liability is a fixed not a contingent liability, like that of a guarantor or endorser of a note, which last is a liability, whether the contract is performed by the maker of the note or not. Partnership is a simple confidential relation like

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that of client and attorney, trustee and *cestui que* trust. The simple power which a partner has to draw more than his share, resulting from the custody of the joint property, cannot create a presumption of fraud. You must prove the act of drawing or the date of the indebtedness. When this is fixed, we have a motive sufficient to create a presumption of fraud. In the absence of such proof, no such presumption arises. The party here then becomes a subsequent creditor, and a subsequent indebtedness does not create a presumption of fraud in an antecedent voluntary settlement, and it certainly should not in case of a purchase.

There is no analogy between this case and the cases of contingent liability before alluded to, where the grantor is a covenantor, a co-obligor, a co-surety, an indorser, or guarantor. It would be carrying the doctrine to an unreasonable extent to hold, that proof of an admitted indebtedness by the surviving partner in 1861, established the existence of that debt in 1853, '54, '55 or '57, because of the fact that he had the custody of the goods as surviving partner from 1855 to 1861, and was a member of the firm from 1850 to 1855. An ordinary contract of copartnership is not one in which money is secured to be paid by one partner to another. The action is not brought upon this contract. That which creates the indebtedness is the act of drawing more than his share, and this is the date which should be established with reasonable certainty. In the contract of partnership, there is a mutual pledge of the skill and capital of the parties to carry on some business in which there is to be a community of interest, a division of the nett profits. If a liability accrues, it cannot be referred to the relation of copartners as the direct proximate and fundamental cause in the degree, and to the extent that the bond is the foundation of the liability in case of an obligor, or a note in the case of a co-surety, indorser or guarantor. (Roberts on Fraud. Con., 459, 461.) So in case of tort, the proof must

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at least fixe the date of the tort before the statute affects a conveyance by a tort feisor.

My conclusion in reference to this matter is, that the plaintiff has failed to show that her testator was a creditor of R. H. Berry in 1853, '54, '55 or '56 or '57, or that such circumstances are established as would create a presumption of fraud in the payment made for this property at that time, or would justify a Court of Equity in following and appropriating the funds. The position of the plaintiff is that of a subsequent creditor. A subsequent creditor in case of a purchase, it has been held, has not such equities as a subsequent creditor in case of a conveyance, (1 Dana, 547); but if in this case we should grant an equal equity to him, it would not, in my judgment, justify the decree.

The doctrine of the Supreme Court of the United States, as announced in the leading case of *Sexton vs. Wheaton*, (8 Wheat., 229), and as understood by Judge Story, is, that a voluntary conveyance made by a person not indebted at the time, in favor of his wife, cannot be impeached by subsequent creditors upon the mere ground of its being voluntary. It must be shown to be fraudulent in fact, or to be made with a view to future debts. There is nothing in this case to show that the settlement was made with a view to future debts. There is no actual fraud, no want of *bona fides* established. The evidence shows that in 1844 or '45, Berry took the benefit of the bankrupt act. That relieved him from debts then existing. Beyond the debts incurred for this property, and subsequently paid, the evidence fails to establish the existence of a single debt at the date of the deeds or the payments for this property, or at any subsequent time, except the debt of Rowles, and the business of the copartnership is admitted to have been profitable by the bill.

I agree with the conclusion of the court, that upon the hearing in the Circuit Court the injunction should have been dissolved and the bill dismissed.

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RANDALL, C. J., delivered the following opinion :

While there is no difference among the members of the court as to the proper judgment to be given in this case, there is one position taken in the leading opinion in which I do not concur. That position is that the plaintiff, the executrix of John J. Rowles, did not stand in the attitude of a creditor of Berry, the surviving partner, upon the death of Rowles and the assumption by Berry of control of the partnership assets, in view of the duty and liability to pay the partnership debts, and to render to the estate of Rowles what it was entitled to upon final settlement, within the meaning of the statute relating to gifts or conveyances "made or executed, contrived or devised, of fraud, covin, collusion or guile, to the end, purpose or intent to delay, hinder or defraud creditors or others of their just and lawful actions," &c. And while it is conceded that the statute referred to does not control in the case at bar, and that the case must be governed by the principles of the common law, the question suggested may be elucidated by reference to adjudications upon the statute.

In my opinion, the estate of Rowles, from the date of his death, when Berry took possession of all the property and assets of the firm, and assumed and undertook to pay the partnership debts, and to account to and pay over to the representatives of Rowles whatever the interest of the estate might be in such effects whenever it should be ascertained, occupied the position of a creditor of Berry, and was one of those whom the statute in question was intended to protect against such gifts, conveyances or settlements as might have been made or contrived by the surviving partner, to the hindrance and damage of the representatives of the deceased partner, and that a voluntary conveyance or settlement by Berry upon his family, after he so became liable, was *prima facie* fraudulent as to the estate of Rowles.

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Berry and Rowles were partners in mercantile business from 1851 to the death of Rowles in 1855. How much capital either of them put into the business does not appear. During a portion of the time, it is concluded from the evidence their business was prosperous. It does not appear that either of them was indebted or embarrassed during this time. Mrs. Berry carried on the business of a milliner and mantua-maker from 1844 to 1846 or 1847, and her business was understood to be prosperous; during which time Mr. Berry and his wife lived together. At the death of Rowles in 1855, Berry continued in possession of the partnership property and effects and assumed the settlement of the partnership affairs, and in January, 1861, made a settlement with the executrix of Rowles and gave her his five notes payable respectively from one to five years from date for the aggregate amount of four thousand dollars, and upon these notes the plaintiff's judgment was obtained. It is agreed by the pleadings that these notes were given for the amount found due from Berry as surviving partner to the estate of his deceased partner, and for a liability incurred in and growing out of the partnership business, the share of Rowles' representative in the net proceeds of the business.

It is not shown that any indebtedness accrued against Berry to the firm or to Rowles during the life time of Rowles.

At the time the partnership was thus dissolved, the survivor took possession of the joint effects, and thus became at once liable to account to the executrix of Rowles for the value of whatever share or interest the latter had in the assets at the time of his death, over and above the copartnership debts; and such liability was not in the nature of a contingent, but a fixed, subsisting, present liability, a ground of action; and if a bill had been at once filed for the purpose of winding up the affairs of the late firm, a court of equity would have directed an account and made a decree for whatever amount was found due the plaintiff after satis-

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fy~~ing~~ the partnership debts and reducing the assets to money. If there had been no valuable assets in the hands of the survivor, or if Berry was not in arrears at the time of Rowles' death, the indebtedness, for which the notes were given, had not existed and the notes would not have been given. The liability arose out of contract. It was a liability to pay money, the amount not being ascertained until the notes were given, and when they were given the amount was found to be four thousand dollars, as acknowledged by Berry in the giving of his notes. The foundation, the fundamental basis of the indebtedness, as thus finally ascertained, existed at the moment Berry assumed the liquidation of the affairs involved in the partnership out of its effects in his possession; and I think that in the absence of any proofs showing grounds for a different conclusion, the liability to pay existed at the death of the partner and the assumption and possession by the survivor of the effects of the firm. Presumptions grow from facts, and from the only facts shown in the present case, I regard this conclusion as legitimate. If it is suggested that the assets may have been in part composed of desperate debts due to the firm, which could not be charged to Berry until they were collected, I can only reply that when these, if any such, were collected, the avails were not paid to the plaintiff nor absorbed in paying partnership debts. But the money must have been at some period realized, and it is equally legitimate to infer that the assets were entirely cash, or in goods convertible immediately into cash, on the moment of the dissolution, and that the sum of four thousand dollars was the amount which had become due, including interest, at the giving of the notes.

If the surviving partner was a trustee of the partnership effects, I cannot yet discover that this would take the case out of the statute; for if a trustee makes voluntary gifts or conveyances to his family, or confidential friends, to the hindrance of creditors *and others*, it is in my judgment one

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of the very purposes of the statute to protect the *cestui que trust* in such cases. But in this case, in the state of the pleadings and proofs as presented, I think the relation of the executrix is that of a creditor, from the date of the death of her testator, of the surviving partner.

In the case of Jackson vs. Seward, (5 Cow., 67,) a judgment was recovered against William Seward in 1820, the suit having been commenced in 1819, upon a covenant of guarantee dated before the deed, to-wit: in 1817, and the defendant had conveyed his property by deed in 1818. The court held, upon authority, that "the guarantee stood in a relation to William Seward, the guarantor, which entitled him to the protection of the statute. * * For our statute for the prevention of frauds is not confined to creditors only, but it avoids all conveyances, &c., devised and contrived with the purpose and intent to delay, hinder or defraud creditors and others of their just actions, &c. * * The question of creditor or not cannot turn on the ground of contingent liability, when considering this act. If it should, all indorsers and sureties would be deprived of its protection. It was said in Twyne's case, (3 Rep., 82,) and reiterated by the court in Jackson vs. Myers, (18 Johns.,) that the statute extends not only to creditors, but to all others who had cause of action or suit, or any penalty or forfeiture. And it has always been held that the statute was entitled to a liberal construction for the suppression of fraud. The demand in this case, *fundamentally*, (as expressed by Roberts on Fraudulent Conveyances, 459,) arose before the conveyance. It arose upon a covenant, prior in date to the conveyance, for the performance of a collateral, and, if you please, contingent act. But it cannot be said that the covenantor was ignorant of his liability so as to exempt him from the imputation of fraud, under the statute, if he has made a voluntary conveyance."

Mr. Senator Spencer, in the leading opinion in the Court of Errors upon the same case, remarks: "I am of opinion

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that Van Wyck, the lessor, of the plaintiff, was a creditor at the time of the conveyance by William Seward to his son, and I am satisfied with the reasoning of Justice Sutherland on that point."

Standing *in the relation* of a creditor of Berry, as I conceive the executrix of Rowles to have stood, upon the facts disclosed in this case, a voluntary settlement by Berry upon his wife of the property described in the bill was presumptively fraudulent as to the demand of the complainant; and unless it appears that Berry, at the time he purchased and paid for this property, had abundant means left in his possession which might have been subjected to the payment of this debt, thus overcoming and rebutting the presumption of fraud, this property should be subjected to the payment of the plaintiff's judgment. The fraudulent intent in such a case is a presumption arising from the fact that a voluntary conveyance or settlement is made when the grantor or donor is indebted, and that his circumstances are such that the conveyance or gift endangers the security of the creditor.

The Supreme Court of the United States, in *Hinde's lessee vs. Longworth*, (11 Wheat., 199,) held that a deed from a parent to a child for the consideration of love and affection is not absolutely void as to creditors. It may be so under certain circumstances; but the mere fact of being indebted would not make the deed fraudulent if it could be shown that the grantor was in prosperous circumstances and unembarrassed, and that the gift to the child was a reasonable provision, according to his estate and condition in life, and leaving enough for the payment of the debts of the grantor. The want of a valuable consideration may be a badge of fraud, but it is only presumptive and not conclusive evidence of it. This agrees with the doctrine of Lord Mansfield in *Cadogan vs. Kennett*, (Cowper, 434,) and in *Doe vs. Rutledge*, (*ib.*, 705,) where the question was between a purchaser and a party claiming under a settlement.

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He said the statute does not say a voluntary settlement shall be void, but a fraudulent settlement shall be void.

The rule in such cases as declared in the case of *Hinde's lessee vs. Longworth*, above quoted, appears to have been generally adopted by the courts in this country.

I have thus far considered the effect of the statute because of the course of the argument, and because the general doctrines involved are properly applicable to the question discussed.

There is no principle better settled than this: that where a party indebted purchases and pays his own money for property, taking the title thereto in the name of a third person, with the intent to delay, hinder or defraud his creditors, a trust results in favor of creditors, and the property so acquired may be reached by the creditor, at least to the extent of the funds of the debtor invested in it. 1 *Cruise's Dig.* tit. XII, chap. 1, sec. 48; 1 *Atk.*, 59; 2 *ib.*, 71; 2 *Ves. & Beame*, 388; 4 *East*, 577; 7 *Cranch*, 176; 19 *Wend.*, 414; 2 *Johns. Ch. R.*, 405; 15 *N. Y.*, 475.

There can be no question in this case that the lands in controversy were contracted for and paid for by R. H. Berry, the surviving partner, and the titles thereof taken in the name of Mrs. Berry.

It may well be, as was insisted by the appellants, that the money thus invested was earned or accumulated by Mrs. Berry, as the result of her own industry and enterprise, but if that were so, it was still lawfully the money and property of the husband.

But there were some ten or more slaves given to Mrs. Berry by one Holbrook, who bought them at the bankruptcy sale of Berry's effects in 1841 or 1842, (and some increase after the gift); but these slaves, as was well urged by respondent's counsel, became at once the property of Berry, by force of the common law. And then there were a carriage, and horses, and silver plate, &c., all the lawful property of Mr. Berry; and the testimony of H. H. Berry and

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of Mr. Flagg goes to show that there was an abundance of valuable property in the possession of Berry before, and at the time of, and subsequent to the death of Rowles, other than partnership property, of sufficient value to pay for the property purchased in the name of Mrs. Berry; and also to pay all Berry's debts and liabilities, including that to the estate of Rowles.

The slaves mentioned "remained with Mrs. Berry during her life," and were, with other property, during the lifetime of Berry, and long afterwards, liable to be subjected to the payment of his debts. All this property was acquired, it is said, by or in the name of Mrs. Berry; but it does not appear that it was in any manner secured to her as her "separate property."

Under these circumstances, it does not appear that the purchase of the real estate was made with the purpose or intent to hinder, delay or defraud creditors; nor that it was in Berry's circumstances an unreasonable post-nuptial provision.

It does not appear, that at the time of the purchase, Berry was embarrassed with *debts*; and it does appear that he was possessed of enough property, after the payment of the purchase money, to pay the claim now presented, and much more, thus rebutting every *presumption* of fraud in that transaction. The presumption of fraud arises where one being indebted makes a voluntary conveyance or disposition of his property; but it is only a presumption or argument of fraud, and is overcome by evidence showing that abundant security remained in the possession of the grantor to satisfy the indebtedness. This is the spirit of the modern decisions. The rule of Lord Hardwicke, and later, that announced by Chancellor Kent, that no circumstances could remove or obviate this presumption, is no longer the prevailing doctrine in England or America.

The fact that, with the close of the late war, all property in slaves was destroyed and lost, cannot affect the question,

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however unfortunate may have been the effect upon the remedy of creditors against the owners of such property. It certainly cannot bear upon the question of the fraudulent disposition of the property of Mr. Berry in 1855 and 1856.

There is another matter which, unexplained, has an important bearing upon this controversy. The liability of Berry was incurred about the close of the year 1855. The plaintiff, for six years, appears to have taken no steps towards enforcing this claim, and meantime, she must have been aware, as it seems the public was well advised of the purchase in the name of Mrs. Berry of the lots from Johnson and the plantation from Col. Houstoun. Yet, in January, 1861, Mrs. Rowles, the executrix, instead of pursuing the available property of Berry, or even then endeavoring to subject this land, as now attempted, to the payment of her demand, took Berry's notes, unsecured, and gave a long time for their payment; meantime, Mrs. Berry, holding the title to this property, and procured credit, perhaps upon the faith of her title, which the plaintiff had declined to attack.

Had the plaintiff any reason to believe or suspect in 1861, or prior to that time, that the purchase of the real estate was fraudulent on the part of Berry, it was extraordinary that she did not insist upon prompt payment, or take prompt measures to secure her claim, instead of extending the credit for five years, without security. Yet she did this, and so must have had faith in his ability to pay and in his integrity. It is shown by the testimony, that the purchase of the land was notorious, and that the purchase of the plantation was at public auction, during the year following the death of Mr. Rowles. Eight or ten years elapsed after this, during which time this prosecution was, it is presumed, voluntarily deferred, while Mrs. Berry was the legal owner of the lands, and the world had a legitimate right to treat with her and extend a pecuniary credit to her on account of her title. The long delay of the plaintiff in the attempt to subject this property to the payment of her demand is an important circumstance, not

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only with reference to the charge from that quarter of a fraud on the part of Mr. Berry, but also in considering the legal rights of the judgment creditor of Mrs. Berry here. If it was apparent that the title of Mrs. Berry was a mere trust estate, doubtless the claims of the *cestui que trust* or his creditors would not be prejudiced by an apparent judgment lien against the legal title of the trustee. But in no sense can it be said that Mrs. Berry was a trustee of her husband, in view of the statute which declares that no trust in lands shall be created except by writing, save such trusts as may result by implication or construction of law. The trust here, if it may be called a trust, must have been in favor of creditors, arising out of the right of creditors to follow the funds of their debtor in proper cases. But it is unnecessary to pursue this question, in view of the conclusion already announced upon the question of the fraudulent intentions of Mr. Berry in the purchase of the property in controversy.

If the lien of the judgment creditors of Mrs. Berry can be entitled to any favor, however, even upon the assumption that the plaintiff might have been entitled to relief as against Mrs. Berry, most certainly her creditors would be entitled to favorable consideration in this case, in view of the fact that the plaintiff has not exercised that diligence that might have been expected from a creditor in her position in prosecuting her supposed remedy.

The decree of the Circuit Court should be reversed and the bill dismissed.

HART, J., delivered the following opinion :

There was property enough besides the plantation and the house in town, liable for Berry's debt, to have paid it, and time enough in which to have realized the amount out of that property, without touching the plantation and house; and therefore the taking of the conveyances in the name of Berry's wife was not an act fraudulent as to this creditor of his.

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The partnership effects became the property of the survivor in trust, &c., who thus became liable to the estate of the deceased partner, to the amount of its share of the nett value, afterwards ascertained to be \$4000. There is no evidence to prove that this amount was, in whole or in part, made up by the diligent collection of doubtful debts due the partnership; nothing to show that the survivor had assumed only a contingent liability. From all that appears, it was a positive liability for a sum that could have been definitely ascertained at any time by Berry, or by a Master in Chancery. Had the administrator of the deceased partner been vigilant, it would have been done in due time, and this suit been prevented. What was the law of the case then, is now. The facts have, in the neglect of years, changed. Then this debt could have been collected out of other property than that which had been deeded to Mrs. Berry. Then those deeds were valid. Now, that other property has disappeared. The deeds are valid still. The neglect of the creditor has not changed the law by which they were then valid.

The judgment of the court is, that the decree in this cause is reversed, and the case is remanded to the Circuit Court of Leon county, for such further proceedings as are consistent with the views expressed by the majority of the court in the opinions herein rendered, and the principles of equity.

A petition for rehearing was filed in this case. The rehearing was denied by the court.

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WILLIAM CAULK, ADMINISTRATOR *cum testamento annexo* OF
DANIEL W. HART, *et al.* VS. SAMUEL W. FOX AND WIFE.

Where the paper filed in this court upon which an appeal is to be heard, is certified by the Clerk of the Circuit Court to contain "copies of originals on file in the cause" in the Circuit Court, and it is apparent that only a portion of the proceedings is embraced in what is thus certified, a *certiorari* cannot be granted to supply the deficiency, and the case will be stricken from the docket.

Appeal from a decree rendered in the Circuit Court of Duval county.

The case being stricken from the docket for informality in the clerk's certificate, it is unnecessary to make any statement of facts.

Sanderson & L'Engle for Appellants.

Fleming & Daniel for Appellees.

WESTCOTT, J., delivered the opinion of the Court.

Quite a number of interesting questions have been presented for our consideration by the counsel engaged in this cause, but the appellant has failed to file in this court a transcript of the record, or, in the language of the statute, "a true copy of all proceedings" in the cause.

The necessary result is, that we have here no case, and it must be stricken from the docket. 5 Ark., 474; 6 Ark., 252; 13 Pet., 459; 3 Dall., 410; 18 How., 110; 7 Fla., 10; Thomp. Dig., 448.

What is on file in this court consists of a copy of a petition filed by appellee, praying that a decree rendered in this case at a previous date might be opened; a copy of an agreement of counsel to the effect that certain questions affecting the interest of the parties they represented, and which were not determined in the previous decree, might be determined, and the decree of the court upon the points thus sub-

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mitted by agreement of the parties. Neither the original decree nor the bill and answer or proofs are to be found in the paper filed, and the counsel for appellant disclaims any connection with these prior proceedings. Had there been a certificate of the clerk in the usual form, to the effect that the paper sent here was a true and correct copy of all of the proceedings in the cause, then the defect could have been remedied at the proper time by a *certiorari*; but there is not here anything upon which a *certiorari* could be based. The clerk certifies that "the foregoing papers are true and correct copies of originals now on file in this cause." What is here filed does not even purport to be a transcript of the record.

In order to justify a *certiorari*, there must be a suggestion of diminution in the record; and, as a matter of course, there must be upon the files of the court what purports to be a transcript of the record or copy of all of the proceedings, before it can hear any suggestion of diminution. 1 Ala., 20.

There is no case here of which we can take cognizance.

The case must be stricken from the docket, appellant to pay costs.

Mr. Justice HART, being disqualified, did not hear this cause.

WILLIAM CAULK, ADMINISTRATOR *cum testamento annexo* OF
DANIEL W. HART, *et al.* vs. SAMUEL W. FOX AND WIFE.

1. While, according to the strict rule of the common law, a freehold estate cannot be created to commence *in futuro*, and an ante-nuptial settlement by the husband of real property upon the wife, in consideration of marriage, under which a freehold estate is to vest in the wife upon the mar-

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riage, cannot operate as a feoffment at common law, yet the instrument will operate as a covenant to stand seized to the use of the person named, and a Court of Equity will secure the wife in the enjoyment of such estate as passes under the deed.

2. While equity will construe a marriage settlement differently from its terms, and vary their strict legal signification in many cases in favor of the issue, upon the presumed intention of the parties to provide for the issue, the same rule is not applicable where the contest is between collaterals, devisees under the will of the husband on the one side, and the wife on the other.
3. In such a contest, if the words used in the preamble and premises of the deed operate to pass a fee simple, and the *habendum* of the deed is inconsistent with the grant in the premises, inconsistent with itself, and uncertain, and such a construction carries out what in the opinion of the court was the real intention of the parties under existing circumstances, the preamble and premises will control, and an estate in fee simple passes.

This is an appeal from a decree rendered by the Judge of the Fourth Judicial Circuit in Duval county.

Daniel W. Hart, the son of Isaiah D. Hart, deceased, being entitled to some property under the provisions of the will of his father, and being about to contract marriage with Johanna F. DeWall, executed with her an ante-nuptial settlement in the words following:

WHEREAS, A marriage is contemplated, and shortly to be had and solemnized between Daniel W. Hart and Johanna F. DeWall, both of the city of Jacksonville, and county of Duval, and State of Florida, being.

Whereas, The said Daniel W. Hart, being willing to make a liberal, certain and sure provision for her support and maintenance, and it having been agreed and understood by and between them, in case of any unforeseen casualty, that whatsoever property or estate, whether real or personal, which the said Daniel W. Hart now hath, or may hereafter acquire or become entitled to, by distribution, gift, or otherwise, from his father's estate, the one-half of which should be made over to the said Johanna F. DeWall, his intended wife, and to her heirs, and not to be subject to or liable for

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his present or future debts or responsibilities in any manner whatsoever.

Now, therefore, this indenture witnesseth, That from and immediately after such marriage being had and solemnized in accordance with law, the said Daniel W. Hart doth transfer and set over unto the said Johanna F., and to her heirs, the one-half of whatever property there may be coming to him, by distribution, gift, or otherwise, from his father's estate, now in the hands of his executors. To have and to hold, all and singular, the said property, for the use, benefit and maintenance of all the said parties herein mentioned, forever; and in case there should be no heirs, then to the sole use, benefit and maintenance of the said Johanna F., and to and for no other use, intent or purpose whatever.

IN WITNESS WHEREOF, The said parties hereunto set their hands and seals this 20th day of May, A. D. 1862.

DANIEL W. HART, [L. S.]

JOHANNA F. DEWALL. [L. S.]

Signed, sealed and delivered in presence of

E. F. HAYNES,

H. KOOPMAN.

The marriage subsequently took place.

The husband, Daniel W. Hart, died some time afterwards testate. There was no issue of the marriage. Johanna subsequently intermarried with Samuel W. Fox. This contest is between Johanna F. and her husband, on one side, with the executors of the will of Isaiah D. Hart, the administrator, with the will annexed of Daniel W. Hart, and the persons entitled to interests under said wills, on the other.

The only question raised by the pleading is, what interest and estate Johanna is entitled to in the one-half of the property coming to Daniel W. Hart under the will of his father, she and her husband claiming that she is entitled to an estate in fee simple; the executors and administrator and parties having interests under the wills claiming that she has a life estate only.

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The Chancellor determined that she had an estate in fee simple, and so decreed. From this decree the parties appellant appeal.

Sanderson & L'Engle for Appellants.

The point to be determined is, what estate Johanna F. Hart (*nee* Johanna F. DeWall,) took under the ante-nuptial indenture.

The appellees contend that she took a fee simple. The appellants that she took an estate for her life only.

To determine the question, it is necessary to consider :

First. The nature of the instrument under which she claims.

Second. The principles by which the instrument should be construed ; and, thirdly, what that construction should be.

1. The instrument is not a deed vesting a fee simple estate, because it was to operate *in futuro*, and a freehold cannot be created to take effect *in futuro*, but *in presenti* only. Suppose no marriage had taken place, would any estate have passed? The answer to this question determines the nature of the instrument. 4 Cruise's Digest, 52. The instrument is an agreement in contemplation of marriage. Its effect is that of a covenant, to stand seized to uses. 4 Cruise's Digest, 116; 2 ib., 310-11. The recitals of the instrument show it to be a marriage settlement only, and not a deed of feoffment.

2. The rules by which this instrument should be construed are not those applicable to ordinary deeds of feoffment, greater latitude being extended to the construction of marriage settlements than to limitations of estate. The intention here governs and will control particular words or expressions. 2 P. Williams, 342; 4 Cruise's Digest, 274; ib., 323; Atherly on Marriage Settlements. Among the rules of construction, we submit these applicable to the instrument under consideration :

All deeds shall be construed favorably, and as near the

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apparent intention of the parties as possible, consistent with rules of law.

When the intention is clear, too minute a stress ought not to be laid on the strict and precise meaning of words. The construction ought to be on the entire deed, and not merely on any particular part of it. The rule that a deed is always construed most strongly against the grantor applies to a deed poll, but not to an indenture as in this case. 4 Cruise, 255-259. Where a deed first speaks in general words, and afterwards descends to special ones, if the special ones agree with the general ones, the deed shall be intended according to the special ones. 4 Cruise, 292.

3. Applying the foregoing propositions to the instrument under discussion, we find that Mrs. Johanna Hart did not take a fee simple, but an estate for life only; for, in executing marriage articles, and construing marriage settlements, courts consider that a provision for the issue of the marriage was a leading object. Atherly on Marriage Settlements, 93-94; 4 Cruise's Digest, 336-351-3. The word heirs, therefore, in the instrument before us, means issue of that marriage. The estate is conveyed to her for life, (no estate being under this construction limited to her), remainder to the issue of the marriage—reversion to grantor if there be no such issue. "Heirs" here is a word of purchase, operating to give the estate to the heirs (that is, issue,) originally, and as the persons in whom the estate is considered as commencing. It is not a word of limitation, operating to expand the estate in the ancestor (Johanna), so as to let the heirs described into its extent, and entitle them to take derivatively through or from her (Johanna), as the roof of succession or person in whom the estate is considered as commencing. 4 Cruise, 293-4.

If this be not the force and effect of the word heirs—if it be not a word of purchase, but a word of limitation, the intention of the marriage settlement (or what the law in the absence of express words to the contrary presumes to be the

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intention,) of making a provision for issue, might be entirely defeated by the wife's (should she survive her husband,) conveying away the estate, or (living the husband,) by his joining her in the conveyance. The word heirs is subject to explanation, and apart from its technical meaning is universally used as synonymous with children. 3 Strobhart's Eq. R., 72, and cases cited; 1 P. Williams, 232; 3 Richd. Eq., 156. The apparent fee simple estate conveyed in the premises of this instrument is qualified by the *habendum*, which says, in the first place, that the estate shall be held "for the use of all the parties mentioned." Who are the parties? Daniel Hart and Johanna DeWall. In a declaration of uses, a use may be declared in the *habendum* to a person (D. W. Hart), to whom no estate is granted in the premises. 4 Cruise, 298.

In the second place, the *habendum* says, "should there be no heirs," (that is, issue of the marriage), the estate shall be held "to the sole use and benefit of the said Johanna."

Although a devise to a person and his heirs gives him an estate in fee simple, yet, if the word heirs be qualified by any subsequent words, which show the intention of the testator to restrain it to the heirs of the body of the devisee, the devise will in that case create only an estate tail. 6 Cruise, 250-1, citing authorities; 7 Taunt., 85; Cro. Jac., 290; 9 East, 382; Cro. Jac., 427-695; 3 Bro. Parl. Ca., 154, cited in 6 Cruise, 251-5; Thurman's case, 1 Roll's Ab., 68; 8 Rep., 154; 1 Inst., 122. "No technical words are required to restrain the general import of the word heirs to the lineal descendants of the grantor; any words that show such an intention will be sufficient." 4 Cruise, 297; Cro. Eliz., 478; Plow., 53-541; 5 Mod., 266; 1 Ld. Raymond, 101. The word heirs in the instrument, being thus divested of its technical sense, and construed to mean issue of the marriage, there are no expressions left by which Johanna can claim more than a life estate. The words "to hold for the use of

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the parties forever," in the *habendum*, do not create a fee simple. Bac. Abr. Title Estates in fee simple, B. 1. Neither, certainly, do the words which follow—"then to the sole use of the said Johanna, and for no othes use." 1 Washb. on Real Property, 617.

Fleming & Daniel for Appellees.

The writing operates as a deed of marriage settlement. It vested in the wife, Johanna, a fee simple and absolute title in the property on the celebration of the marriage. There can be no doubt as to the first conclusion. Will not a careful and critical examination lead to the second conclusion?

The words used are such as are required to create a fee simple, to-wit: "heirs." 2 Greenleaf's Cruise on Real Property, 656.

The words used to create a life estate, to-wit: "To hold to the said A. B. and his assigns for and during the term of his natural life," or words of similar import, are no where used. The words used create a fee simple estate. Do they admit of a different legal construction? Let us consider the instrument as marriage articles. What is the rule of construction? "In the case of marriage articles, the construction is founded on the *apparent* intent of the parties, however untechnically expressed, and is therefore more liberal than in the case of deeds." 2 Greenleaf's Cruise on Real Property, 679. What is the apparent intent as expressed in the preamble? That a marriage being contemplated between Daniel W. Hart and Johanna F. DeWaal, the said Hart was willing to make a liberal, certain, and sure provision for her support and maintenance, and that he would do this by making over to his intended wife, Johanna, and to her heirs, the one-half of what he was entitled to receive from his father's estate, whether real or personal. Read the preamble to the deed; and in the body of the instrument it is provided, that from and immediately after

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such marriage shall be solemnized, in accordance with law, the said Hart doth transfer and set over unto the said Johanna, and to her heirs, the one-half of the property that may be coming to him, &c. ; and by the tenendum it is held to the benefit and maintenance of the said parties, in the said deed mentioned, forever. What parties? Not Daniel W. Hart; because the intention, as expressed in the preamble, was to make a provision for Johanna and her heirs not subject to his debts. That he could not do and provide for his maintenance out of the same fund, because in that case it would not be secure from his debts. By all the parties in the said deed mentioned, was meant Johanna and her heirs. "And in case there should be no heirs, then to the sole use, benefit, and maintenance of the said Jahanna." For how long? Her life? There is no such limitation. Therefore there is no limitation inconsistent with the grant to Johanna and her heirs, which had before passed the fee. In the whole instrument there is nothing that looks to a reversion to Hart and his heirs. Do the words contradict the apparent intent? We find no such contradiction.

But, as we have before said, the paper operates as a deed and not as an agreement. Therefore, the rule for construing deeds must govern its construction—one of which is, that subsequent words shall not defeat precedent ones, if by construction they may stand together; but when there are two claims in a deed, of which the latter is contradictory to the former, then the former shall stand. 2 Greenleaf's Cruise on Real Property, 591. Modern decisions have restricted this rule to a certain extent. *Ibid.*, note 2. But, notwithstanding the modification, it is still applied with its original force to clauses clearly repugnant. *Ibid.*, note 2. In grants, if words of restriction are added which are repugnant to the grant, the restrictive words are neglected. *Ibid.*, note 3. For example: A deed of a water course contained in the granting part the words, "to him and his heirs, executors and assigns forever;" and there was a covenant that the

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grantor, his executors, administrators and assigns, shall enjoy the premises forever, or so long as he may want the use of the water for machinery, and no longer: Held, that the covenant was not repugnant to the grant, but if it was so, it should be rejected. 16 Barb., 150. Whatever is expressly granted, or covenanted, or promised, cannot be restrained or diminished by subsequent provisos, restrictions, &c.; but general or doubtful clauses precedent, may be distributed or explained by subsequent words and clauses not repugnant or contradictory to the express grant, covenant or proviso. 3 Pickering, 277. What is the grant to "Johanna and her heirs?" What does the word mean as used in this deed?

"The word heir, like all other legal terms, when unexplained and unconstrued by the context, must be interpreted according to its strict and technical import, in which sense it obviously designates the person or persons appointed by law to succeed to the real estate in question in case of intestacy." 2 Jar. on Wills, 2.

Now is there any expression in this deed to indicate that the legal heirs of Johanna are not meant? It may be contended that the words, "and in case there should be no heirs," indicate that the word "heirs" is used for and means "children." We reply, that the preamble to the deed much more clearly indicates that the word is used in its ordinary sense (and the language in the tenendum points to the same interpretation) in the grant; and if a limitation was sought to be made, it was inconsistent with the grant, and must be rejected. But we argue that the words, "in case there should be no heirs," were not intended for a limitation. If children are meant, the words are not repugnant but superfluous, and the result of the ignorance of the person who drew the deed, who, supposing the estate conveyed would be divided between the mother and the children, by this last cause sought to secure the property to the mother, if there were no children. If the word "heirs" means children, there is nothing in the deed to indicate that the intention was to

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limit the property to the children of any particular marriage; and who shall say that Johanna may not yet have children?

But again: does the word "heirs," as used in this deed, mean children, and children of the then intended marriage? How will the grant operate? As a conveyance to Johanna and children of Daniel W. Hart? The word heirs, in its usual acceptance, is not used at all, consequently the fee is not conveyed to the children or to Johanna by the deed, but would have remained in Hart, even if he had had children by Johanna. 4 Kent, 5. Can any one suppose that such a disposition could have been intended by Hart?

As we have before shown, money is not only a good consideration, but the very highest consideration. This deed transfers half of the estate of the grantor to Johanna F. and her heirs, which clearly conveys the fee simple estate to Johanna. If a fee simple estate for a good consideration is created, there can be nothing to defeat it in the subsequent restrictions; the words "Johanna and her heirs" must be construed in their settled legal sense. The attempt to create a use, could not defeat the estate, for, supposing we admit that it was intended that the property should be, or its proceeds, used for his wife and their children, and then the words, "should there be no heirs," refer to the children of the intended marriage, it could not have been intended by Hart to create a trust in his intended wife for the use of his heirs generally, or for their maintenance or benefit. At the death of Hart, there being no children living, the estate was certainly freed from all restriction. The last clause is not repugnant to the words of conveyance, "her heirs," as it only gives her rights and privileges to which she was entitled under the deed without such clause.

WESTCOTT, J., delivered the opinion of the court.

The question in this case is, what estate and interest Johanna F. Fox is entitled to in the one-half of the prop-

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erty coming to her former husband, Daniel W. Hart, from his father's estate.

To determine this question, we are to construe the instrument set forth in the statement of the case, as it is under this instrument that she claims. Upon the part of the appellants, it is insisted that the instrument cannot operate as a feoffment at common law to pass a freehold estate to the wife upon the happening of the future event of marriage, because a freehold estate could not thus be created to commence *in futuro*, and that the effect to be given to the instrument was that of articles of marriage settlement; that under this instrument, giving it that effect, "the estate is conveyed to the wife for life, (no estate being limited to her,) remainder to the issue of the marriage, reversion to the grantor if there be no issue; that the word heirs here is a word of purchase, operating to give the estate to the heirs (that is, issue,) originally, and as the persons in whom the estate is considered as commencing. It is not a word of limitation operating to expand the estate in the ancestor so as to let the heirs described into its extent, and entitle them to take derivatively through or from her (Johanna) as the root of succession or person in whom the estate is commencing."

The position of appellants just stated is inconsistent with another position which they take in reference to this instrument. They insist that the term "parties," in the *habendum* of the instrument, means the husband and wife, the persons who executed it. If this be so, and the estate thus limited in the *habendum* controls, and such an estate can be thus limited, then the same beneficial interest which passes under the deed to the wife would pass to the husband, and hence the wife could not have an absolute life estate in the whole property.

On the other hand, appellees contend that the instrument was effective as a formal disposition, (1 Sch. & Lef., 87,) that the estate which passed under the deed was an estate

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in fee; that upon the marriage, the legal title either vested in the wife under our statute, or if this result did not follow and the deed was ineffectual to pass the legal title to the wife, then the husband would be treated as a trustee during coverture, and upon the death of the husband, the wife surviving, a court of equity would make the deed effectual to pass such an estate to the wife. It was no doubt the purpose of the parties by this instrument to settle the property in accordance with an antecedent agreement, and not to reduce to writing the terms of such agreement. This is evident from the preamble or recital of the instrument. If it fails to have this effect, it will be the result, not of a want of intention that it should have this effect, but the result of the application of the rule of the common law that an estate of freehold must take effect presently, either in possession or remainder; the estate under this deed not taking effect presently because it was to take effect only on the marriage, and it could not take effect in remainder as there was no precedent particular estate to support the remainder—no estate between the date of the conveyance and the marriage. This instrument purports to be an antenuptial settlement, and not articles of agreement embodying the terms of a settlement to be made after marriage. The rule as stated by Mr. Atherly is, "that it is only in cases where the parties themselves evidently considered the instrument in the light of articles, and intended a future act, that courts of equity will so consider it. Where they clearly intended it to operate as a final, complete settlement, it must always be looked upon *as such*." Atherly on Marriage, 123. If such an instrument can be made effective to pass a freehold estate upon the happening of the marriage, that is an end of this question, and we have only to determine what estate passes under the terms used, being controlled in the construction of those terms by the rules obtaining in a court of equity in like cases.

Such an instrument, viewed as a feoffment at common
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law, could not be sustained; but such an instrument, having a marriage consideration, has been universally sustained as a covenant to stand seized, although, generally speaking, a settlement should not be made by covenant to stand seized. In such a case as this, where there is a consideration for raising a use, the instrument is construed as a covenant to stand seized to the use of the person specified, and the estate passes, not by feoffment as the deed says, but by virtue of the statute of uses and "*ut res magis valeat quam pereat*," and the estate which the party is entitled to is such estate as was intended, if consistent with the rules of law. 2 Wilson, 77; Shep. Touch., 83; 2 Ves., jr., 226; 1 John. Cases, 96; 20 John., 87; 22 Wend., 142; 32 Maine, 332; 3 N. H., 452; 15 N. H., 393; 4 Mass., 136; 7 Mass., 384; 22 Pick., 380; 4 Desau., 627; 2 Hill Chy., 3.

We have thus only to determine what estate was intended to pass under the terms used in this instrument, being controlled in our construction by the rules obtaining in a court of equity in like cases.

The preamble or recital of this instrument sets forth substantially that the husband had, anterior to its execution, agreed to make a liberal, certain and sure provision for the support and maintenance of his intended wife; that the property to be secured to his intended wife was not to be subject to or liable for his present or future debts in any manner; and an agreement and understanding between them that he was to "make over" to his *intended wife and her heirs* one-half of the property to which he was entitled then or might thereafter become entitled to from his father's estate. It is plain that the legal effect of the terms used here determine the estate agreed to be made over to be a fee simple, and that there is no expression of an intention to provide for the issue of the marriage. The only intention expressed, the only matter agreed upon, was to provide for the wife. The grant in the premises of an estate to the said *Johanna F. and her heirs*, is the grant of an estate of

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inheritance, a fee simple. This really is all that is perfectly clear in the instrument.

When we reach the *habendum*, a difficulty, a doubt arises. Construing it as appellants do, it is inconsistent with what precedes. It has inconsistent provisions in itself. The *habendum* is "to hold for the use, benefit and maintenance of all the said parties herein mentioned;" and then follows a clause not securing a benefit or passing an estate to the heirs, but providing that in the event there are no heirs, then *habendum*, "to the sole use, benefit and maintenance of the said Johanna F., and to and for no other use, intent or purpose whatsoever." Appellants insist that the word parties in the first clause of the *habendum* means Daniel W. Hart and Johanna F. DeWall. They also insist that the word heirs in the next clause means issue of the marriage, and they insist that the estate which the wife takes under the deed is a life estate.

It is plain that the wife, under either of these clauses, took no life estate, giving the words the construction contended for. In the one case, the husband would take an equally beneficial interest with the wife; and under the other, the wife would take no life estate in the whole property, except upon the happening of the contingency, the failure of issue. Any beneficial interest in the subject matter of the grant remaining in the husband, is inconsistent with his expressed intention in the previous part of the deed, to the effect that the estate was to be limited to Johanna and her heirs, and that the property was not to be subject to his debts, either present or future. On the other hand, giving the word heirs in the last clause of the *habendum* its strict legal signification, this clause would amount to a grant of an estate upon a condition which could not be known or determined until after the time during which the estate was to be enjoyed had expired, a grant of a life estate to a person upon condition that he has no heirs, when

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you cannot determine whether he has any heirs until after his death, *nam* "*nemo est haeres viventis*."

Something was said in argument in reference to giving those words in the *habendum* a construction which would limit the estate granted in the premises to certain uses, making the party Johanna the feoffee to such uses as are declared in the *habendum*. We do not think there was any such purpose.

The estate which the parties intended to pass under the deed was not a statute use. It was manifestly an estate at common law, and the words for the use, benefit and maintenance, &c., only served to show in how ample and beneficial a manner the feoffee was to take the estate granted. 1 Cruise, 429, 30, 31. The *habendum* should have commenced by a limitation of the estate to the grantee in such manner as was intended. This was, however, omitted, no doubt through want of knowledge, and what there is in it is nothing more than certain words to show the extent to which the estate previously granted was to be enjoyed by the grantee.

According to the construction contended for by appellants, the effect of the *habendum* here is to control the previous grant in the premises, and an estate "is conveyed to the wife for life, remainder to the issue of the marriage." It is impossible to construe this deed in such way that the issue of the marriage are to derive such an estate under it, for even if you were to insert the words "issue of the marriage," instead of the word "heirs," in the deed, no such estate would thereby pass to them under it.

Considering this last clause in the *habendum* with reference to the manifest intention of the parties to secure a permanent benefit to the wife, and giving the word heirs here the meaning contended for by appellants, the wife would not even have a life estate, except in the event there was no children or issue of the marriage. A life estate, upon the condition that it was to vest only in the event the wife had

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no children by the intended husband, could never be called a "liberal, certain and sure provision" for her support. We have no idea that such a thing as this was intended. On the contrary, if we were permitted to enter the field of speculation, uncontrolled by the terms and legal effect of the deed, we would conclude, from the peculiar use of the word "parties" and the word "heirs," that it was the purpose of the parties to secure some benefit to the issue; what benefit, however, we would be unable to determine from anything before us, and we would also be of opinion that the purpose of the last clause of the *habendum* was to vest a fee simple, rather than a life estate, in the event there was no issue, the parties no doubt conceiving that the words there used passed such an estate.

It certainly would be unauthorized in a deed of this character to give an arbitrary construction to it, unauthorized by its terms, contrary to their legal effect, even when modified as suggested, and consistent with no apparent intention, in order to pass an estate in remainder to the issue of the marriage. This would not be the case, even if the instrument being construed was articles with similar provisions, instead of a final settlement and disposition.

Mr. Atherly remarks that, "so strongly do courts of equity lean in favor of a strict settlement," (that is, a settlement limiting a life estate to the parties, with remainder to the issue,) "that if the articles even limit the estate to the husband or wife in fee, yet if it appears that the object must have been to make a provision for the children, the articles must be executed in strict settlement." Atherly on Marriage Settlements, 94-95. This is stating the rule strongly in favor of the issue. Can it be said in this case that "the object must have been to make a provision for the children?" We think not.

There is no doubt that courts of equity go very far in construing contracts of this character, whether executory or executed, whether in the shape of articles or final settle-

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ments, to give them effect, so as to secure a benefit to the issue of the marriage, when such construction is consistent with the rules of law in reference to estates; but there is nothing in the adjudged cases which would justify us in creating an estate in remainder to the issue under this instrument, when, according to no fair construction, is there an estate in remainder or an estate tail passed to any one.

Whenever, according to their strict legal signification, the marriage articles gave the parents an estate tail, courts of equity in England, as a general rule, executed the articles in strict settlement; that is, whenever the articles limited the estate to the settler and *the heirs of his body*, instead of permitting a fee tail to pass, the estate was limited to him for life, with remainder to the first and other sons in fee tail. 1 P. Williams, 622; 1 Ves., 238; 2 Atk., 39; 2 Bro. P. C., 122; 1 Bro. C. C., 384; 3 Atk., 371.

The reason was, because if an estate tail passed, a recovery might be suffered and the estate aliened, thus depriving the issue of any benefit. As remarked by Lord Chancellor Hardwicke, that on a settlement for valuable consideration, to make the father tenant in tail would be nugatory, and the same as making him tenant in fee. Where, however, the husband's estate was settled on the wife and the heirs of her body, there an estate tail was limited to the wife, because she was prohibited by statute from discontinuing, aliening, or suffering any recovery of an estate tail derived through settlement by the husband.

While we do not propose to say what effect should be given to an instrument of this kind passing an estate tail, we remark that our statute provisions in reference to estates tail prevent the existence of many of the evils which these decisions remedy; but, however this may be, there is nothing in the case which brings it within these decisions. None of the decisions go to an extent which would justify us in giving this deed, which, according to everything that is definite or certain in it, was intended to pass a fee simple, a con-

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struction which would vest an interest in remainder under it in the children.

The great difference between this case and the cases cited by appellants, is manifest. The case in 2 *Piere Williams*, 341, was an agreement by marriage articles that the testator would convey lands to the heirs of the body of his niece, Mary Bennett, by her said husband, and to *their heirs*. It appeared from the preamble that the purpose was to advance the issue of the marriage. The words, heirs of the body of the niece by her husband, were "construed children."

The instrument under consideration in the case in 3 *Strob.*, 71, limited the estate to the joint heirs of the husband and wife. The subject matter was personal property, in conveyances of which the word heirs is not necessarily used.

The court held that the term joint heirs could not, under the circumstances of that case, there being children then in being, be held applicable to any other persons than the two children then in being, and that they took to the exclusion of the after-born children. Neither side denied that the intention of the deed was to vest a beneficial interest in the issue of the marriage. The only question was, whether the interest vested exclusively in the children then in being, or in all the children, including those *in esse*, as well as those to be begotten.

The case in 4 *Desau.* was an executory devise. The devise was, "I give and bequeath to my son, John Lee, certain lands and negroes (enumerated in the will), to him and his heirs;" and in a subsequent clause, after other bequests to other children, the will directed, "If either of my children should die with" (meaning without, as was agreed by counsel), "an heir, then his share shall go to the rest of my children." It was not questioned that the word heirs here meant children. It was used in the same sentence as synonymous with it.

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There are clear distinctions and differences between this case and all the cases which we have been able to examine.

These cases construe the word heirs, under certain circumstances, to mean children, and then pass such an estate as by this substituted meaning is limited to the children. In this case you can make the substitution, and no such result follows as to create a remainder in their favor. Besides, as we have before remarked, the latter portion of the *habendum* (although the terms used would pass only a life estate, and that only in case there was no issue), was no doubt, in fact actually intended to pass a fee to the wife in one-half of the property in the event there were no children, which is the fact presented by the record.

The issue of the marriage are no parties to this contest. The husband is dead, and there can be no such issue. While courts of equity will give a liberal construction to the terms employed in instruments of this character in favor of the issue, when it is possible that the issue may be benefitted upon the presumed intention of the parties (when there is room for a presumption to operate,) to provide for the issue, yet we cannot see why this rule, which is the creature of a court of equity, originating under a statute of facts where a benefit may accrue to the issue, and to produce that result, should be extended to a case where the party who seeks to vary the terms of the instrument, and who is to derive a benefit, is one who claims through the husband, as against the wife, such an one being not a child, and the circumstances such that no issue of the marriage can ever derive a benefit. 1 Baldwin C. C. Rep., 489. The reason ceasing, the rule should cease. Upon what principle would a court of equity favor one rather than the other of these parties?

Estates limited to trustees to preserve contingent remainders from the power of the tenant of the preceding particular estate, were introduced, in order to secure in family settlements the provisions intended for the benefit of the issue of the marriage against being defeated by the parents, the

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tenants for life, and courts of equity have always deemed the joining in a conveyance by such trustees to destroy the contingent uses or remainders a breach of trust. If, however, there was no issue of the marriage, and a subsequent remainder to the right heirs was limited, and a collateral relation only was affected by such act of the trustees, courts of equity have refused to punish the trustees. The reason of the difference is, that in one case the court considers the issue the object of the settlement and within the consideration, while the remainder to the right heirs is merely voluntary. 1 P. Williams, 359-387; 1 Eq. Ab., 385; 2 Cruise, 384.

While it is true that the parties here do not claim under the deed by way of remainder to the right heirs, yet they are not the issue of the marriage; and the same reason for the distinction taken in the cases above, exists for the difference we have stated in the rule of construction when the issue seek a benefit, and where collaterals or devisees under the husband's will, not being issue of the marriage, are seeking aid from a court of equity.

The effect sought to be given to the *habendum* here, is neither to qualify, explain or enlarge the premises within the meaning of the authorities. 4 Cruise, 433-4.

To pass a life estate by the *habendum*, would be repugnant to the premises, and it is the precise case stated by Blackstone as being inadmissible. 2 Black., 297; 2 Bac. Ab., 545; 4 Cruise, 433-5. Where the estate granted in the premises is a fee, and the estate limited by the *habendum* is a life estate, (which really is not the case here), a fee passes. The *habendum* is inconsistent with the premises—inconsistent with the expressed intention of the parties, and uncertain. It is our opinion that it was the actual intention of the husband, and the understanding of the wife, that the husband would divest himself of his entire estate in one-half of his property—that this was the purpose in thus framing the premises of the deed. The word parties in the

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habendum, we believe, was intended as a substitute for the words Johanna and her heirs in the premises; but from the peculiar phraseology of this and the subsequent clause of the *habendum*, we are inclined to the opinion that the parties thought the effect of such a use of the terms was to give the estate first to the wife, and at her death, to the children; and from the last clause of the *habendum*, we think it was the purpose to pass a fee simple to the wife, in the event there were no children. To pass a fee simple to the wife, under the circumstances, is therefore consistent, in our judgment, with the application of the rules of construction, as well as the actual intention of the parties.

Only one other question remains to be disposed of in this case: The intended effect of this deed was to pass an estate to the wife upon the happening of the marriage.

Under our statute, married women may become seized or possessed of property, real or personal, by bequest, demise, gift, or purchase, during coverture, subject to certain limitations. The standing of the wife, under such a deed as this, is that of a purchaser for value, and we can see no reason why, under our statute, coverture could have operated to have prevented any interest passing which should pass under the deed. But this is immaterial; nor do we decide this point, as a court of equity will protect her by making the husband a trustee, if necessary, or devise some other method to secure to her such beneficial interest as passes under the deed. The precise case is considered in 2 Hill's Ch. Rep., 5. There the husband, reciting the intended marriage, undertook to convey the property directly to the wife. The court say, "To give effect to this contract at law, the conveyance ought to have been to some third person, as trustee for these uses, but equity presumes that done which ought to have been done; and in adjusting the rights of the parties in this court, we must suppose that the intended husband and wife had joined in a deed, conveying the property to some third person as trustee."

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The decree of the Chancellor being conformable to the views expressed in this opinion, it is affirmed, and the case is remanded for further proceedings in execution of the decree, which were suspended by the appeal. The parties, appellant and appellee, will each pay one-half of the costs attending this appeal.

Mr. Justice HART, being disqualified, did not hear this cause.

HENRY L. RITCH, APPELLANT, VS. ADAM L. EICHELBERGER,
MICHAEL A. CLOUTS, EDWARD M. L'ENGLE, AND
SAMUEL D. MCCONNELL, APPELLEES.

Royall obtained judgment against Eichelberger, which was a lien upon all the real estate of E., consisting of several detached parcels, and execution was issued and levied upon the real property of E. Subsequently, E. mortgaged a portion of the property to Ritch. After this, C. H. & Co. obtained judgment against E. The sheriff, under the senior execution of Royall, advertised for sale the lands levied upon, including the mortgaged lands, the lands not mortgaged being ample to satisfy the Royall execution. Before, and at the time of the sale on the R. execution, L. and M. had purchased and were the owners of this Royall judgment and execution, and the mortgagee repeatedly tendered to them, and also to the sheriff, the amount due thereon, informing them of his mortgage lien, and of his desire to protect it, which tender was refused. The mortgagee then requested the sheriff to offer for sale the property levied on which was not included in the mortgage, or to offer any small fraction or subdivision of the property levied on, which the sheriff, under advice of the owner of, and of the defendant in the execution, refused to do. The sheriff then released from levy considerable property not mortgaged, and sold it under the C. H. & Co.'s junior execution, and offered for sale, and sold, against the protest of the mortgagee, the bulk of the mortgaged property, consisting of several distinct tracts in bulk,

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leaving unsold only a small part of the mortgaged property, of value entirely insufficient to secure the amount stated to be due on the mortgage, but sufficient to pay the amount due on the Royall execution: *Held*,

1. That it was the duty of the sheriff to accept the tender of payment by the mortgagee, so that the mortgagee would not lose his security upon the mortgaged property. *Held further*, That it was the duty of the sheriff to have first sold the property of the defendant in execution not covered by the mortgage, and that the sale of the mortgaged property upon the execution while there was abundant other property levied on, out of which the execution could have been satisfied, was a legal fraud upon the rights of the mortgagee, and the purchaser, then being an owner of the judgment and execution, and having notice of all the facts, is not an innocent purchaser.
2. When a party has two funds out of which he can satisfy his debt, and a junior creditor has a lien upon one of the funds only, the first creditor will, in equity, be compelled to resort to that fund which the junior creditor cannot reach, so that the junior creditor may avail himself of his only security, where it can be done without injustice or injury to the debtor or creditor.
3. In a suit in equity to foreclose a mortgage given by E. to Ritch, it is proper to make parties all who have junior liens upon the mortgaged property, and all who have become purchasers under a prior lien, if such purchasers bought with notice of the equitable or legal rights of the mortgagee which were sacrificed by the improper proceedings of the officer making the sale, or of the owners of the lien under which the sale was made.
4. Royall made a *bona fide* sale to L. and M. of a judgment and execution which was a lien upon property covered by a junior mortgage, under which execution the mortgaged property was improperly sold, after the transfer of the judgment and execution. In a suit in equity, instituted for the purpose of foreclosing the mortgage, and to set aside the sale under the execution, it is not necessary to make the original plaintiff, who had so parted with his interest in the judgment and execution, a party to the foreclosure suit, as he had no legal or equitable interest in the matter.
5. A bill in chancery is not necessarily multifarious because it contains irrelevant or redundant matter. To render a bill multifarious, it must contain two or more good grounds of suit which cannot be properly joined in the same bill against the same or several defendants.

This is an appeal from a decree rendered in the Circuit Court for Marion County.

Henry L. Ritch files a bill against Adam L. Eichelberger,

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and the other defendants, seeking the foreclosure of a mortgage executed by Eichelberger to him, as well as to set aside a sale of the mortgaged premises which had been made under a judgment at law rendered before the execution of the mortgage deed. The material allegations of the bill are:

1. That at the date of Eichelberger's mortgage to Ritch, March 16, 1866, here sought to be foreclosed an execution in favor of William Royall against Eichelberger, in the hands of the sheriff, was in reality not fully satisfied, though it appeared to be so, there being about \$600 due on it, for which, under an order of the Judge, obtained by petition at law, a new execution was issued, and there were other executions against Eichelberger which appeared to be satisfied.

2. That at December term, 1866, Cohen, Hanckell & Co. obtained judgment against Eichelberger, and execution delivered to the sheriff.

3. That March 6th, 1868, the sheriff, instigated by Eichelberger, and L'Engle & McConnell, attorneys for Cohen, Hanckell & Co., to injure Ritch and defeat his mortgage lien, levied the said Royall execution upon said mortgaged lands, and upon lots in Ocala not mortgaged, which unmortgaged town lots were and were then known to them to be sufficient to bring money enough at sheriff's sale to satisfy said Royall execution, and that Eichelberger then had, known to them, abundance of unencumbered property more than sufficient to satisfy it.

4. That about the same time the sheriff levied the Cohen, Hanckell & Co. execution upon certain other lands of Eichelberger, and upon the equity of redemption of the lands covered by said mortgage.

5. That the sheriff advertised all these levies for sale on January 4, 1869.

6. That December 7th, 1868, L'Engle & McConnell purchased the said Royall execution, and thereafter controlled it.

7. That January 4, 1869, the sheriff, instigated by Eichelberger and by L'Engle & McConnell to injure and defeat

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Ritch's mortgage lien, sold lands levied under both of said executions, to satisfy the Cohen, Hanckell & Co. execution, to L'Engle for \$1,300, and on the same day complainant tendered to the sheriff and also to L'Engle the amount due upon the Royall execution, which they severally refused.

8. That January 23d, 1869, the sheriff advertised that on March 6th, 1869, he would sell the said mortgaged lands to satisfy said Royall execution, and certain other lands of Eichelberger, to satisfy said Cohen, Hanckell & Co. execution; and, instigated by said Eichelberger and by said L'Engle & McConnell to impair and defeat Ritch's said mortgage lien, omitted to advertise certain valuable town lots (describing them) originally levied upon and previously advertised under said Royall execution, and subsequently released therefrom, which were of less value than said mortgaged lands, but more than sufficient to satisfy said execution; and on said sale day in March, refusing a tender of \$1,500 by Ritch to satisfy it and save his lien, and refusing an offer by Ritch to bid the amount of said execution for even the smallest part of said land if he would offer it separately, sold the whole in bulk, in a manner to prevent competition, to said L'Engle for \$2,000 to satisfy said Royall execution, and conveyed them to said L'Engle. The proceeds of this sale were applied to the Royall execution, leaving \$1,164 72 surplus in the hands of the sheriff.

9. That said mortgaged town lot is the only part of said mortgaged land unsold, and would not bring one-sixth of the debt intended to be secured by said mortgage.

The bill prays that the sheriff pay the \$1,164 72 to Ritch, with interest from March 6, 1869, it being the balance of the proceeds of the sale of the lands covered by said mortgage. That Ritch be allowed to redeem said sold mortgaged lands by paying the amount of said Royall execution, and upon the payment by him to said L'Engle of the balance of said purchase money, with lawful costs and expenses of securing titles. That said sheriff's deed be declared null and void,

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and Ritch be restored to his original rights under said mortgage. That a receiver be appointed for the rents and profits of said mortgaged lands. That an account be taken of said debt to Ritch. That Eichelberger be decreed to pay Ritch what may be found to be due him, with costs of suit, or in default be foreclosed, and to deliver up the title papers, &c., and a prayer for general relief.

The defendants demurred :

1. That complainant has not by his bill shown any legal right or title to the discovery or to the relief sought.
2. That the bill is multifarious.
3. That it appears by said bill that William Royall is a necessary party to the bill, yet is not made a party.
4. That as to the discovery and relief sought against the defendant, Eichelberger, the complainant can have an effectual and complete remedy at law.
5. And for divers other good causes of demurrer thereto.

The demurrer was overruled, and defendants ordered to answer, whereupon the defendants appealed.

The petition of appeal sets forth :

1. That the Judge erred in overruling the demurrer.
2. That the judgment and decree ought to have been for the appellants sustaining said demurrer, instead of for the appellee overruling said demurrer.
3. That the order overruling said demurrer works a wrong and injury to the appellants, and was not necessary for the protection of any of the alleged rights of the appellee, as set forth in his bill of complaint.

L'Engle & McConnell, for Appellants.

The first ground of demurrer is that the bill does not show a right to the discovery and relief sought. The debt not being established, and the property admitted to be subject to the mortgage lien not being exhausted, the bill is prematurely filed and should be dismissed. 2 Hill Chy., 121; 1 Hill S. C., 113, 335; 2 Hill So. Ca., 611; 4 Rich., 197.

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Should the court reach a different conclusion, then we contend that the case made by the bill does not justify a court of equity in disturbing the title acquired by the purchaser at the sale under the *fi. fa.* The bill charges no fraud or irregularity in the judgment and execution under which the sale was made. There is, therefore, in these respects no ground for setting aside the sale. The charge is, that the proceedings of the sheriff under the *fi. fa.* were illegal, the bill alleging that the levy upon the mortgaged property was made by collusion between Eichelberger, L'Engle and McConnell, who combined to defeat the mortgage lien. This allegation is completely answered by the bill itself, which shows that L'Engle and McConnell had no interest in the execution when the levy was made, nor until ten months afterwards. If there was no collusion in making the levy, it must have been on the part of William Royall, or his attorney, or the sheriff who made the levy. The land here sold was subject to sale under the execution. If such a sale was prejudicial to the junior mortgagee, chancery would have protected his lien if it could have been done without prejudice to the rights of other creditors. He neglected to pursue his remedy, and now after a sale of such property under the *fi. fa.*, it is too late. The purchaser should not be disturbed. 1 John Cas., 505; 5 How., 192; 12 Fla., 185, 301; 1 Hill S. C. Ch., 113. It is no excuse that he sought relief in a court of law instead of a court of chancery and failed through this error. It was his own fault, and a court of chancery should not interfere now after a sale, when new equities, new rights and new interests are involved. (See authorities just cited.)

Another allegation in the bill is, that the appellee forbid the sale and tendered payment of the execution. The answer to this is, that the appellee was in no way connected with the process and had no right to instruct the sheriff. Having neglected his proper remedy, he could only have come in as a bidder. Had he become the purchaser, he

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could have had relief by a bill seeking to foreclose his mortgage and an appropriation of the excess over the amount of the execution to his mortgage debt. Harper's Eq., 164. Nor was the sheriff competent to decide upon these equities, (8 Fla., 350; 12 Fla., 633,) or authorized under these circumstances to discharge the levy. Thomp. Dig., 355.

Another allegation is, that the land was sold in bulk. Even the defendant in execution could not assign this to avoid the sale, unless he furnished the sheriff with a map of the land dividing it into lots. 1 John. Chy., 502; Rice's Eq., 3.

The next ground of demurrer is, that the bill is multifarious.

The objects of the bill are, 1st. To establish a debt claimed to be due from the appellant, Eichelberger, to the appellee. 2d. To foreclose a mortgage from Eichelberger to the appellee. 3d. To set aside a sale made by the sheriff of Marion county to E. M. L'Engle under a *fi. fa.* older than the mortgage. 4th. To make the sheriff pay over to the mortgagee the surplus money from the sale under execution. 5th. That the mortgagee be allowed to redeem the land sold by the sheriff and purchased by the appellant, L'Engle. 6th. To have a receiver appointed to collect rents of the land now owned by the appellant, L'Engle. 7th. To compel the appellant, Eichelberger, to deliver to the appellee the deeds to the mortgaged land, and that an absolute title to this land be decreed to the appellee. The defendants below have no joint interest in these several objects of the suit. The other appellants have no interest in or connection with any accounts between Eichelberger and the appellee; nor have they any interest in the property now subject to the appellee's mortgage, nor are they parties to this mortgage. The other appellants have no interest in or connection with the title which the appellant, L'Engle, holds to the land sold under the Royall execution, nor will

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they be affected if the sale be declared void. The question of the appellant Clouts' liability to the appellee for the surplus of the purchase money from the sale under the Royall execution, is one in which the other appellees are in no way interested. And so throughout the whole bill, the objects are distinct and separate, the interests of the appellants entirely different, and the prayer such as, if granted, would require several distinct decrees.

Two or more distinct objects cannot be combined in one suit. 1 Dan. Chy., 384, 385 and notes, 388, 390, 394, 396; Story's Eq. Pld., 271, 272, 274, 278, and note, 280, 540; 2 How., 619.

The next ground of demurrer is want of parties, William Royall not being a party to the suit. William Royall should be a party defendant, because he is the plaintiff in the execution under which the mortgaged land was sold, which sale appellee seeks to set aside. 2d. It being charged that the levy under this execution was made by collection for the purpose of defeating appellee's mortgage, Royall should be a party defendant because he owned and controlled the execution at the time that the levy was made. 3d. It being charged that L'Engle and McConnell bought the execution from Royall on the day of sale, thereby charging collusion and confederacy between L'Engle and McConnell and Royall, it is important that Royall should be a party defendant. 4th. Because L'Engle and McConnell have their action against Royall, if they fail to receive the benefit of the execution purchased from him. Their claim against him would be for damages sustained by them in consequence of his selling to them an execution which was illegal. 1 Dan. Chy., 234; 240, 619 and note; 4 Fla., 11; Story's Eq. Pld., 540, *et seq.*

Papy & Peeler, with whom was *Geo. P. Raney*, for Appellees.

Geo. P. Raney for Appellees.

The appeal in this case is taken upon four grounds :

1. That the bill shows no right to discovery. The power to compel discovery is one of the distinguished attributes of a Court of Chancery, and whenever there is ground for equitable relief, discovery will be enforced, except where crimination or exposure to penalties, exposure of certain confidences, as those entrusted to attorneys by clients, and certain matters of State, would result. The case at best presents no grounds placing defendants within these exceptions. Adams' Eq., 105, *et seq.* This being the case, the discussion of this question is unnecessary.

2. *Multifariousness*.—Multifariousness, properly speaking, is where different matters having no connection with each other are joined in a bill against several defendants, a part of whom have no interest in or connection with some of the distinct matters for which the suit is brought, so that such defendants are put to the unnecessary trouble and expense of answering and litigating matters stated in the bill in which they are not interested, and with which they have no connection. Newland vs. Rogers, 3 Bar. C. R., 434-5.

The objection of multifariousness is confined to cases where the case of each defendant is entirely distinct and separate in its subject matter from that of his co-defendants; for the case of one defendant may be so entire as to be incapable of prosecution in several suits, and some other defendant may be a necessary party to only a portion of the case. In the latter, multifariousness is not an available objection. 2 Ala., 571 to 573. It is not practicable to define multifariousness; each case must be examined in reference to the leading principle not to subject one party to a litigation between others in which he has no interest, and not to allow a multiplicity of suits. 2 How., 618, 642-3; 2 Ala., 571.

3. Royall, the assignor of the execution, a necessary party. 8 Sme. & M., 357. There is no question as to payment of the execution. Plaintiff proposes in the bill to pay it, hence there is no liability upon part of R., and hence no interest.

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4. That in relief sought against Eichelberger, plaintiff can have remedy at law.

The right to relief is shown by the following authorities: When one creditor has a lien on two funds, and another creditor a subsequent lien on one of these funds, the former will be compelled first to exhaust the subject of his exclusive lien, and will be permitted to resort to the other only for the deficiency. 1 Hopkins 460; 2 Smedes & M., 357; 1 Jo. Chy., 447; 5 Jo. Chy., 239; 9 Cowen, 403. The principle of Clowes vs. Dickinson applies to mortgages as well as to absolute conveyances. 9 Paige, 103. According to the principles thus decided, the court will save the complainant harmless against the machinations of the defendants, particularly as the complainant sought the privilege of paying off the execution under which the defendant, L'Engle, purchased; which execution he and McConnell owned and controlled prior to the sale.

HART, J., delivered the opinion of the court.

The first ground of demurrer in this case is, that the complainant shows by his bill no right to the discovery or relief sought. The bill is filed for the foreclosure of a mortgage alleged to have been duly executed by Eichelberger, a defendant, and acknowledged and recorded, and that there is due by its conditions over twelve thousand dollars. It prays a decree for the amount to be found due, and that it may be satisfied out of the property mortgaged, by a foreclosure of the equity of redemption. It alleges that the defendants have conspired and confederated to defeat and deprive him of his mortgage lien by certain unjust and inequitable acts, and have placed obstructions in the way in order to prevent him from enforcing his legal and equitable rights as a mortgagee, demands the removal of those obstructions, and that he may have such relief as he may be equitably entitled to without detriment or injury to any other person.

Let us look at the facts as they are stated in the bill. The

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complainant, Ritch, holds a mortgage upon valuable plantation property, and also upon a town lot in Ocala, on which some twelve thousand dollars is due. Royall has a judgment which is a prior lien, on which some six hundred dollars is due, upon which execution issued and was levied upon the plantation property, and upon certain other property in Ocala not included in the mortgage, and much more than sufficient to satisfy the execution. Upon the sale day in December, 1868, on which day the property had been advertised to be sold, L'Engle & McConnell, two of the defendants, purchased the Royall judgment and execution, and then the sale under it was postponed to January, 1869. Subsequently to the making and recording of the mortgage, Cohen, Hanckell & Co., by L'Engle & McConnell, their attorneys, obtained judgment for a large amount against Eichelberger, upon which judgment execution was issued and levied upon the same property which had been levied upon under the Royall execution, and upon still other lands of Eichelberger, which were of considerable value, and also subject to the lien of the Royall judgment and execution. In January, 1869, the sheriff sold, under the Cohen, Hanckell & Co. execution, lands not covered by the mortgage, but subject to the lien of the Royall judgment and levied upon under it, for an amount more than sufficient to pay the Royall execution. At the same time the sheriff offered for sale in bulk the property levied upon under the Royall execution, including the mortgaged lands. The complainant protested against the sale being made in this manner without avail. He then requested the sheriff to offer the property for sale in parcels, according to the subdivisions described, or any fraction of any such subdivision, offering to bid for it the full amount of the execution. This was refused by the sheriff and by the owners of the execution. The complainant then tendered the whole amount of the execution in payment thereof, whereupon the money, in legal tender notes, was taken and counted over by the defendant, L'Engle, and then re-

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fused by him; whereupon the same tender was made to the sheriff, and refused by him. The sale under the Royall execution was again postponed, and the sheriff then advertised for sale the mortgaged lands only under that execution, omitting and releasing the other property previously levied on, and advertised the said other property for sale under the Cohen, Hanckell & Co. execution, both sales to take place in March, 1869, and the property so levied on under the Cohen, Hanckell & Co. execution, (and which had before been levied on and offered for sale in January under the Royall execution and released from it,) was then on March sale day sold under the Cohen, Hanckell & Co. execution to said defendant, L'Engle. Afterwards, on the said March sale day, the sheriff offered for sale all the mortgaged property except the town lot, when complainant again offered and tendered payment in full of the Royall execution, which tender was refused. He then requested the sheriff to put up and offer any one of the subdivisions of the land as advertised, or any fractional part thereof, offering to bid the whole amount of the Royall execution. This was also refused, and the whole plantation property was then offered for sale, and actually sold to said L'Engle for two thousand dollars, and the sheriff executed deeds therefor to said L'Engle. The amount bid was first applied to the Royall execution and costs, and there remained a balance in the sheriff's hands of \$1,164 72. The town lot in Ocala would not sell for more than \$2,000 or \$3,000, and is the only portion left of the mortgaged property not sold under this Royall execution, and is entirely insufficient in value to satisfy the mortgage debt of the complainant.

Why the amount of the Royall execution was not accepted by the sheriff or by the owners of the execution when offered and tendered, and why the sheriff refused to sell the town property, or a small fraction of any of the property under the circumstances, so that the complainant might preserve some adequate security for his mortgage debt; or why

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any portion of the mortgaged property should be sold, (other property having been levied on sufficient to satisfy the execution and released to junior creditors,) or why that other property was released from levy, it is difficult to conjecture, upon the statement made in the bill, except upon the theory and for the reasons alleged by the complainant.

Where a party has two funds out of which he can satisfy his debt, and another creditor has a lien posterior in point of time on one of the funds only, the first creditor will, in equity, be compelled to resort to that fund which the junior creditor cannot touch, in order that the junior creditor may avail himself of his only security, where it can be done without injustice or injury to the debtor or creditor. This principle, which is so equitable and just, was thus illustrated by Lord Harwick in *Lanoy vs. The Duke and Dutchess of Athol*, 2 Atk., 446: "Suppose," he said, "a person who has two real estates mortgaged both to one person, and afterwards only one estate to a second mortgagee, the court, in order to relieve the second mortgagee, have directed the first to take his satisfaction out of that estate only which is not included in the mortgage to the second mortgagee, if that is sufficient to satisfy the first mortgage, in order to make room for the second mortgagee."

But a court of equity will take care not to give the junior creditor this relief if it will endanger thereby the prior creditor or in the least impair his right to raise his debt out of both funds. *Evertson vs. Booth*, 19 John., 486. And it is further held in that case that the junior creditors might have applied to pay up the prior incumbrance, and thus substituting themselves in the place of the prior mortgagee, have availed themselves of all his rights; and in *Schreyver vs. Teller*, 9 Paige, 173, the Chancellor says: "If the judgment creditors were seeking to enforce collection of their judgments against the mortgaged premises, (their judgments being also a lien upon other lands,) to the prejudice of the mortgagee, he would have an equitable right to insist that

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if he paid the judgments, he should have an assignment thereof to enable him to obtain a repayment out of the surplus proceeds of the property not mortgaged in preference to purchasers or incumbrancers of that property, whose claim thereon had accrued subsequent to the date of his mortgage." In Rathbone and others vs. Clarke and others, 9 Paige, 648, the Chancellor remarks that the proper decree in a case where the rights of the defendants were not set out in the bill of foreclosure, and the right to a foreclosure was not questioned, was to direct the master to sell the mortgaged premises in the inverse order of the alienation of the several parcels, and according to equity as between the defendants; leaving the master to settle the order of sale upon the principles of equity.

The equitable and legal rights of junior incumbrancers in such cases, and the duty of officers in making sale, are thus emphatically treated by Chancellor Kent in Woods vs. Monell, 1 John. Chy. R., 502: "I have no doubt of the value and solidity of the rule, that where a tract of land is in parcels distinctly marked for separate and distinct enjoyment, it is, in general, the duty of the officer to sell by parcels, and not the whole tract in one entire sale. To sell in parcels is best for the interests of all the parties concerned. The property will produce more in that way, because it will accommodate a greater number of bidders and tends to prevent odious speculations upon the distress of the debtor. Nor does the officer act within the spirit of his authority if he sells more than is requisite to satisfy the execution. To sell a whole tract when a small part of it would be sufficient, or probably sufficient for the purpose, *is a fraud that ought to set aside the sale.* The principle which I have suggested has received a judicial sanction. (Rowley vs. Webb, 1 Binney, 61; Extrs. of Stead vs. Course, 4 Cranch, 403; Hewson vs. Deggert, 8 Johns., 333.) and whenever a case comes fairly within the reach of it, I shall very willingly adopt and apply it."

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We understand from the bill in the case at bar, that the lands subject to the mortgage and which were levied upon under the Royall execution were described as several distinct lots and parcels, making it necessary to produce a map or survey for the purpose of identifying and describing each parcel and the quantity and value of each.

The case of *Clowes vs. Dickenson*, 5 Johns. Chy., 235, and *Gill vs. Lyon*, 1 Chy., 447, cited by counsel, and many other cases which we have examined, are so uniform and so pointed in the same direction, that we think there can be no conflict of opinion in regard to the question here presented.

The purpose of the plaintiff in the Royall judgment, or of the owners of the execution, was, legitimately, to collect the amount due thereon. The acceptance of the payment tendered by a junior creditor having a lien upon a portion of the property, made for the evident purpose of protecting his rights, would have given the prior creditor all that he could get by the delay and the expense of making a sale. The request of the mortgage creditor that the prior creditor first exhaust the defendant Eichelberger's other property already under levy before coming upon the mortgaged portion, was one which the prior creditor and the officer were bound to respect. The actual release from levy of property levied upon by virtue of the execution under the prior judgment, and of sufficient value to pay the execution twice over, and the sale of that property which constituted the principal security of the complainant against his repeated remonstrances, and in the face of a repeated tender of the amount due up to the moment of the sale on the execution, so involves the officer who made the sale that he is deemed to have been properly made a party to this suit.

It was urged in the argument that this bill is prematurely brought as against the purchaser under the Royall execution, and that the complainant should first have proceeded to the sale of that part of the property covered by the mort-

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gage, which was not sold under the execution. The bill alleges that it has depreciated in value since the date of the mortgage, and is not of present value enough to pay more than about one-sixth of the mortgage debt. The future progress of this suit will show whether this is true or not. For the present, its truth is admitted by the demurrer.

It is contended for appellants that, admitting the alleged indebtedness of Eichelberger to Ritch, and that the mortgaged property unsold is not sufficient to pay, the court cannot disturb the title of L'Engle acquired by the sale of March, 1869, under the Royall execution, the judgment and execution not being alleged to be fraudulent, unless the proceedings by the sheriff were illegal; and that under such circumstances, even if, after sale, the judgment should be reversed, the title of an innocent purchaser without notice will not be disturbed. The case made by this bill sets forth that the proceedings by the Sheriff were irregular and illegal, and that the purchaser had notice and conspired with the sheriff in his acts that made them so; and the doctrine contended for does not apply.

It was suggested in argument that L'Engle and McConnell had no interest in nor control over the Royall execution at the time when the levy was made, and not until ten months thereafter; that the bill shows no benefit that could accrue to them or to Eichelberger, from which to presume collusion; that if there was any, it must have been on the part of Royall or his attorney and the former sheriff who made the levy, neither of whom is a party to this suit. It is true that the bill complains of the levy, but it also complains of the sale, and of the part that L'Engle & McConnell and Eichelberger took in it; and as L'Engle & McConnell were the owners of the Royall execution at the time of the alleged illegal sale, and one of them became the purchaser of the said mortgaged property under it, the making parties of them reaches the most material facts complained

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of so as to enable the court to do equity between all the parties actually in interest.

It is argued that a judgment as soon as entered, and a *fi. fa.* as soon as delivered to the sheriff, create a lien upon all the property of the defendant within the jurisdiction of the court rendering the judgment; that a *fi. fa.* may be levied upon any property that is subject to it; that the defendant in execution may have the levy discharged by pointing out other property sufficient to satisfy the judgment; and that fraud is not shown because the defendant does not see fit to do so. It was not so much the levy as the sale that oppressed the complainant; and here the defendant in execution is not charged with fraud upon the plaintiff in execution, but it is charged that while he (the defendant in execution) had abundance of property not subject to the junior lien to satisfy the prior lien, he and the other defendants, knowing this fact, so contrived the sale as to sacrifice most of complainant's securities, when justice to all did not require it; that the intention and effect of said contrivances were to weaken or destroy the plaintiff's security, to prevent competition, and to encourage and reward unjust speculation by the defendants at the expense of complainant, greatly to his injury.

It is further argued that if a *fi. fa.* be levied upon property subject to a mortgage junior to the judgment, the mortgagee has a remedy provided by law, and should pursue that remedy. He should file his bill of complaint to marshal the defendant's assets, and should call in all his prior lien creditors. If he neglects to pursue his proper remedy until after a sale of the property, it is too late to ask that the sale be set aside, and the title vested in the purchaser disturbed.

This doctrine might be applied if the vendee was not by the allegations in the bill excluded from any present ruling in favor of innocent purchasers.

The authority of the sheriff to change the levy made by

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a former sheriff is denied by appellants. Such denial would imply that such officer is bound by the levy made by his predecessor, however erroneous, oppressive, or fraudulent it might be, and though he might be aware of gross illegality in it, he would be powerless to change it for a legal and just levy, and would be obliged to sell all of the former levy as made, and in bulk, even though he might be assured that any small part of it would bring enough to satisfy the execution. Thompson's Digest, 355, is cited as sustaining this argument, but the statute does not go that far, and a diligent search of the authorities fails to disclose such a restriction upon the official authority of any sheriff. Indeed, the sheriff *did* abandon the levy in January, 1869, of a part of the property levied on and advertised, and sold only the mortgaged property under the senior judgment.

It is argued that if the defendant in execution had forbid the sale and tendered payment, there would be some force in it, but that the appellee was in nowise connected with the process, and had no right to instruct the sheriff. That, having neglected to take the necessary steps to restrain the sale, he could only come in as a bidder, and by becoming the purchaser, obtain relief by bill to foreclose his mortgage, praying that the surplus should be substituted for the land and applied to the payment of his mortgage debt. In *Burnett and others vs. Denniston and others*, 5 Johns. Ch. R., 35, Chancellor Kent held that where a subsequent judgment or mortgage creditor tenders to a mortgagee the full amount of the debt and interest due on the prior mortgage, with costs, which he refuses to accept, unless another debt due to him from the mortgagor not charged on the premises is also paid, but proceeds to sell the land under the mortgage, such sale is irregular and void. Nor can the defendant, W. G. D., (says the Chancellor,) be entitled to protection as a *bona fide* purchaser without notice. It is in proof that the plaintiffs, or one of them, was present at the sale, and in the presence of the defendant, W. G. D., forbade the sale, and

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stated publicly the right of the plaintiffs and the fact of the tender.

The sheriff had authority to accept the payment tendered by this mortgagee, and had he done so and tendered it to the execution creditors, it was all that they had any right to demand, and they must have been held to be satisfied with it. It was no part of the duty of the sheriff to exercise his authority in such a manner as to result in needless injury to the existing interests of any person, and no part of the object of the execution to aid any person in impairing that mortgage lien. No person but the sheriff had any lawful control of the sale. He had authority to discontinue it, and had he returned the writ, "satisfied by payment by Henry L. Ritch, a mortgagee of the land levied on, in order to save his mortgage lien," no court would have ever questioned the justice of his act. The refusal to accept the payment afforded no protection to any rights of the defendant in execution; it was no right of his to have his property thus sold, nor that of the plaintiff in execution, nor his assigns, whose only right was to have the amount of their judgment debt. The tendency of the refusal and the sale was to impair the mortgage lien, and the bill alleges that to have been the intention, and that Eichelberger, and L'Engle & McConnell, the assignees of the execution, and one of them the purchaser of the mortgaged property, conspired with the sheriff against the complainant to have it done. If this is true, and it is admitted by the demurrer, the bill is full of equity. Nor is the appellee justly subject to the charge of neglect of his remedy. He had a right to expect that the sale would be fairly conducted by the sheriff, and that the tracts of land would be offered separately by the descriptions by which they had been levied upon and advertised, so that he could bid the full amount of the execution for any one of them, and thus save his lien. It was the duty of the sheriff so to offer them, if he sold them. By his acts the complainant was hedged in by circumstances in nowise essential to jus-

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tice, that left him no just opportunity to save his lien. The officer of the law was evidently working against him, and from no fault of his, when it was the duty of the officer to act justly, favoring no one. Had he accepted the tendered payment, the property and all questions concerning it would have remained as they were, the execution would have been paid, and no injustice resulted to any one.

It is argued that the sheriff is not competent to decide upon equities between parties not connected with the process; and yet, by refusing to accept the payment by one so deeply interested in the property, as he must have known the complainant to be, he refused the best possible performance of the duty imposed upon him, and did discriminate in favor of one against another.

It may be true that in the prayer of the bill there are matters of relief prayed which are not warranted by the facts stated, but there are some to which the complainant is entitled. There is also a general prayer for relief.

It is usual to add the general prayer for such relief as the particular circumstances of the case may require; so that if the complainant mistakes the relief to which he may be entitled, the court may yet afford him that relief to which he has a right, and it has been said that a prayer for general relief, without a prayer for particular relief, to which the party thinks himself entitled, is sufficient, and that the particular relief which the case requires may be prayed at the bar. *Cooper's Eq. Pl.*, 14; 2 *Atk.*, 3. And may amend the prayer for relief in order to pray for other relief, where improper relief has been prayed. *Cooper's Eq. Pl.*, 333; 12 *Vesey*, 48. This demurrer goes not to any particular thing prayed for, but to the whole prayer for relief; and if the bill shows a right to any of the relief sought, the demurrer is not good, though some portions of the prayer may not be well founded, and may be mere surplusage.

The second ground of demurrer is, that the bill is multifarious. It is true that there is a considerable portion of the

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bill devoted to the narration of matters which may be unimportant and irrelevant, but this is not necessarily multifariousness. To render a bill multifarious, it must contain two or more good grounds of suit, which cannot properly be joined in the same bill against the same or different defendants. 9 Paige, 188. A plaintiff may have a good cause of action against each of several defendants, but the determination of each of which severally does not affect the others; or where a party is brought in as a defendant upon a record, and he has no connection with the case made by the bill against others. In such a case the party so brought in may demur, but more properly for a misjoinder of parties. Story's Eq. Pl., par. 530. "In order to determine whether a suit is multifarious, or, in other words, contains distinct matters, the inquiry is not whether each defendant is connected with every branch of the cause, but whether the plaintiff's bill seeks relief in respect of matters which are in their nature separate and distinct." "If the object of the suit be single—but it happens that different persons have separate interests in distinct questions which arise out of that single object—it necessarily follows that such different persons must be brought before the court, in order that the suit may conclude the whole subject." "A bill in equity is not multifarious where one general right is claimed by the plaintiff, although the defendants may have separate and distinct rights." 1 Daniel's Ch. Pl. and Pr., mar. p. 386, and note 2. "And in the case of the Attorney General vs. Poole, where the case against one defendant was so entire as to be incapable of prosecution in several suits, but another defendant was a necessary party in respect of a portion only of that case, it was decided that such other defendant could not object to the suit on the ground of multifariousness." *Ibid.*, top p., 401. It is thought that these authorities meet all the grounds of argument urged in support of this objection. Tested by any rule laid down in the books, the bill in this case is not liable to the objection.

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The third ground of demurrer is, that William Royall is a necessary party, as shown by the bill. The bill shows that Royall, the plaintiff in the execution, sold and assigned his judgment and execution to L'Engle & McConnell in December, 1868, after it had been levied upon the mortgaged property, and upon other property of Eichelberger sufficient to satisfy the judgment without reaching the mortgaged property, and that after the assignment by Royall, the sheriff, by direction of L'Engle & McConnell, released from the levy the property not mortgaged, and advertised for sale, and sold, only the mortgaged property. This is the wrong complained of, and Royall was in nowise a party to it, nor can he be affected by this suit in any event. He is not a necessary party.

The fourth ground of demurrer, that the complainant has a remedy at law to Eichelberger, was not insisted on.

The order of the Circuit Court, overruling the demurrer, must be affirmed.

CHARLES H. LATROBE *et al.*, APPELLANT, VS. WILLIAM R. HAYWARD, APPELLEE.

In March, 1861, A agreed to purchase of B certain lots in Tallahassee, Florida, and improvements to be constructed thereon by B. The sum agreed to be paid was an estimated value of the lots and the actual cost of the improvements. After the execution of this agreement, B removes to the State of Maryland, leaving an agent in Florida. A remains in Florida, giving his personal attention to the work, having authority from B to make such additions or alterations in the original plan as he desired. Additions and alterations were made by A. In July, 1863, (between which date, and the date of the completion of the improvements, communication between Maryland and Florida was suspended by war,) B, in Maryland, received a letter from his agent in Flor-

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ida, and sought A, then in Maryland, for a settlement. A settlement was made, and a deed subsequently executed for the property. In making such settlement it was the expressed intention of neither party to suffer any considerable loss, nor to surrender any right under the original contract. Through a mistake in the construction of a sentence in the letter of the agent, a final settlement was had, and a note given for a much less sum than was due. This note B, with the consent of A, transferred to C, in payment of a balance due by him (B) for the 'ots which he (B) had purchased of C. The sentence erroneously construed related to the cost of the alterations in the original plan made by A, of which B was uninformed, and which, from the acts and language of A, he was authorized to believe were inconsiderable, while the proofs show they amounted to a considerable amount: *Held*,

1. That in such case a court of equity should open the settlement; that the true balance ascertained to be due, was a balance of purchase money due upon a sale of real estate; that while the estate at law passed under the deed to the vendee, yet in equity the vendor retained a lien for the balance of the purchase money.
2. That B, having used the note of A, given him in the settlement, to pay a balance due by him (B) to the party from whom he purchased the lots did not affect his (B's) lien for the balance of the purchase money due him (B) by A, over and above the amount of the note.
3. Where there are equities arising from contract, or by operation of law, by virtue of which the plaintiff is entitled to subject specific property to sale, the courts of the State where the property is situated have jurisdiction, although none of the parties are residents of the State where the property is. In such a case the jurisdiction attaches to the thing, and can only be brought into action where the thing is.

This is an appeal from a final decree in the Circuit Court for Leon County.

The case is fully stated in the first note of the decision and the opinion of the court.

Samuel J. Douglas for Appellants.

This is a suit brought to enforce a vendor's lien for the payment of a sum of money claimed to be due the complainant for the completion of a house in the city of Tallahassee, under an agreement between the parties. It is insisted that the court has no jurisdiction, as both the com-

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plainant and respondents reside in another and the same State, to-wit: the State of Maryland.

To give a court of equity jurisdiction to hear and determine a case, where both complainant and respondent are non-residents, the proceedings must be *in rem*, and not *in personam*. If the suit is to enforce a claim or demand against the defendant, and not a lien on land, then the proceedings are *in personam*, and must be had in that jurisdiction where the party defendant resides. 1 Bibb, 409; 4 Monroe, 436; 1 J. J. Marshal, 474; 2 Bibb, 444.

If it should be insisted that the subject matter of the suit in this case is to enforce a vendor's lien, and therefore the proceedings are *in rem*, it is answered, that the evidence of the complainant, Hayward, and the answer of the respondents, show conclusively that the lots of land were paid for by the note of the respondent, LaTrobe, which note was received as so much money, and so expressed on its face; was used as money in payment of the debt of the complainant, Hayward, due to H. R. W. Andrews for the said lots of land, who accepted the note of the respondent as full payment of the debt of the complainant to him. This was before the institution of the suit by complainant.

Andrews, the original owner of these lots of land, could not, after the acceptance of the note of respondent, proceed to enforce a vendor's lien against Hayward, nor could Hayward do so against respondents, they having settled with Andrews his indebtedness to him for these very lots of land, by a payment from LaTrobe, the respondent, for the lots of land on which he now seeks in this suit to enforce a vendor's lien.

At the institution of this suit there was nothing due for the lots of land from the complainant, Hayward, to Andrews, the original owner, or from LaTrobe, the respondent, to Hayward. The note given by LaTrobe to Hayward, and by him transferred to Andrews, was in payment of these lots of land, as shown by the receipt given by Hayward to LaTrobe; and

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after this payment, a deed for the lands was made by Hayward to LaTrobe.

The pretended indebtedness of LaTrobe for work, and labor, and materials, cannot, upon any known principle of law or equity, be the subject of a vendor's lien. The undertaking of the defendant was to pay so much money for the property as it then stood, and for any additional expense for the completion of the building. The evidence shows that the realty, to-wit: the lots of land, have been paid for before the commencement of this suit, and a full settlement made with the very party who would have had a vendor's lien against Hayward, and that a title deed was executed to respondents. If anything remains unsettled, it is for the work, labor and materials used and employed in completing the building. These cannot form the subject of a vendor's lien to authorize a proceeding *in rem*, and is only a personal demand against the respondents, which the party complainant must enforce in a court of law, like any other subject matter of indebtedness cognizable by these courts, and the respondents insist that this indebtedness has been fully paid and discharged.

The implied or equitable lien of a vendor is *only upon the land*, and gives the vendor no right to go into a court of equity to enforce it against the rents and profits thereof, or for work, labor and materials bestowed in the erection of buildings on the land. Such liens can only exist by special statute, which must be strictly followed. 2 Leigh, 353.

2. The complainant, if he has any claim or demand against the respondent, has a complete and adequate remedy at law, and equity will not interfere to give relief and its aid where the remedy at law is adequate and complete. Jeremy's Eq., Book III., ch. 5, p. 505; 2 Randolph, 449; 2 Johnson's Ch., 169; 6 Vesey, 136; 1 Brown Ch., 195.

3. The parties in this suit have had a full settlement of the matters in controversy. A full receipt and discharge has been given and accepted, and the court will not go behind

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it. If both parties acted in good faith, and there was no undue concealment of facts—if *both* were *ignorant* of the facts, a court of equity will not interpose between them. The instances of mere mistake of facts upon which a court of equity will *actively* relieve, arise where the party applying on that ground was *alone* under a mistake at the time of the transaction. If the mistake is *mutual*, no relief will be given. Jere. Eq., Book III., p. 366; Fonb. Eq., Book 1, ch. 2, sec. 7; Story's Eq., sec. 150-51; 4 Johns. Ch., 566; 1 Bro. Ch. Cases, 158; 3 Swanst., 476; 2 Ball & Bat., 171; 2 Bro. Ch. Cases, 420; 4 Pr. Ech., 135; 1 Vesey, p. 211; 2 Johns. Ch., 274; 2 Atk., 592; 2 Phillips, 338; 13 Penn., 371; 5 Met., 274; 9 Pick., 231; 1 Atk. Ch., 10.

If both parties are ignorant of the fact about which a mistake has occurred, a court of equity will not interfere between them. Jere. Eq., 366; 2 Atk., 592.

In this last case it was held, "that after an agreement has entirely settled all differences between parties and their several rights, the hands of the court are *so tied up* that they will not enter upon a question which might have been decisive had there been no such settlement." In the matter of settlement, the mere fact that one of the parties was in error as to the amount of benefit which he relinquished, cannot create an equity that will authorize the interposition of a court of equity. Adams' Eq., 375-76; 5 Russ. Ch., 149; 2 Ball & B., 171; 6 Cl. & F., 911; 3 B. Monroe, 510; 4 Dana, 309; 3 Swanst., 476; 9 Vesey, 23, note 3; 3 Bro. Ch. Cases, 453; 2 Cox, 134; 9 Ala., 663.

In this last case it was held by the Supreme Court of Alabama, "that although a contract is entered into under a mistake of law or fact, yet if it was made in good faith, each party possessing equal information, or equal means of acquiring knowledge, neither having practiced any unfairness or deception towards the other, a court of equity will not grant relief."

It is well settled that a mistake of fact will not vitiate a

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compromise when it is common to both parties. 2 Strob. Eq., 250; 5 Humphrey, 259; 2 Sandford, 542; 4 Met., 271.

4. A mistake must be *clearly and strongly* proved, to authorize a court of equity to interfere. It must be as conclusively proved as if the defendant had admitted it in his answer to complainant's bill. Note to page 58, Fonblanque Equity; 1 Johns. Ch., 252; 3 Bro. Ch. Cases, 452; 1 Story's Eq., sec. 181; 2 How., 702; Rice Eq., 275; 2 Myl. & Crg., 712; 4 Blackf., 432; 15 Vermont, 576; 10 Vermont, 452; 17 Vermont, 183; 11 Vermont, 138; 1 Maryland Ch. Decisions, 239; 2 do., 151; 4 do., 335.

5. Equity will refuse relief and its aid to those who by their own negligence have incurred the loss, or may suffer the inconvenience. It gives relief only to the vigilant, and not to the negligent—not to those who have the means of acquiring information, have chosen to omit all inquiry which would have enabled them at once to correct the mistake, or to obviate all ill effects therefrom. Story's Eq., sec. 146, and note; Fonblanque Eq., Book I, ch. 3, sec. 3; 4 Johns. Ch., 566; 30 Maine, 266.

The facts, in relation to which the mistake is made, must not only be *material*, but such as the party could not have by reasonable diligence acquired the knowledge of, *when put upon enquiry*. 5 Hump., 529; Story's Eq., sec. 146; 4 Johns. Ch., 566; 30 Maine, 266; 4 Maryland Ch. Decisions, 335; 9 Vesey, p. 24.

The rule upon this subject is the same at law as in equity. 5 Maul. & Sel., 380; 12 East, 638.

6. If an agreement for the compromise of a cause is fairly made between parties, a court of equity will not overhaul it, although there has been a great mistake in the exercise of their judgment.

A compromise of disputed rights, both parties being *ignorant* of the true state of their rights, is valid, and will not be disturbed by a court of equity, whether the *ignorance* be of matters of law or fact. 5 Hump., 529; Story's Eq., sec.

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149; 4 Dana, 309; 2 Ball & Bat., 171; 2 Atk., 592; 2 Rand., 442; White & Tudor's Eq. Cases, 265; 6 Munf., 406; 2 Bibb, 343; 1 Watts, 216; 6 Watts, 421; 1 Watts & Sarg., 445; 8 Watts & Sarg., 31; 5 Watts & Sarg., 111.

A compromise of doubtful rights will not be opened or rescinded, even when *unequal or harsh* in its operation. Compromises are *favoured in equity*, whatever the nature of the controversy compromised, and they cannot be set aside because the events show *all the gain* to have been on one side, *all the sacrifice* on the other, *provided the parties acted with good faith*.

In the case of Moore vs. Fitzwater, 2 Rand. Rep., 442, Judge Cabell, in delivering the opinion of the Supreme Court of Virginia, said: "It is sufficient that the parties themselves have settled the question; and, as there was no fraud or undue advantage, we would not disturb it, even if assured the appellee had no title."

When the uncertainty, either of the *facts* or the *law*, is present to the parties' minds, and they intend to settle their rights, whatever they may be—*i. e.*, knowing the *facts* to compromise the *law*, or being *doubtful* of the facts, to compromise *both fact and law*—there is no reason for setting aside the transaction, for it is based on the existence of a *doubt*. There is no *mistake* in what is done, and the mere fact that one of the parties was in error as to the amount of benefit which he relinquished, cannot create an equity for setting aside the settlement. Adams' Eq., 370; 3 B. Monroe, 510; 4 Dana, 309; 7 Paige, 560; 2 Paige, 478; 1 Sim. & Stuart, 566.

The evidence in this case shows most clearly there was a compromise made by the parties of the matter in dispute. The complainant Hayward went to Baltimore to see the respondent LaTrobe, in order to get a settlement. He exhibited to the respondent a letter he had received from his agent, stating a sum yet due to the complainant from the defendant. This sum was larger than the respondent

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thought it ought to be, from the character of the work done. The complainant also demanded interest on the sum said to be due, which the respondent did not think he ought to pay. After long consultation and discussion between the parties, the defendant *agreed* and consented to pay the sum claimed to be due, and also *half-interest* on that sum. This proposition of the respondent was accepted by the complainant, and he executed his note for the amount agreed upon, which note by agreement and consent was passed to H. R. W. Andrews, a creditor of the complainant, who was then present to receive it; and upon the transfer and delivery of this note to Andrews, in payment for lots of land, a receipt in full of all demands was given by the complainant to the respondent. This receipt is made an exhibit in this case, and the attention of the court is respectfully called to its terms. It is not a receipt for so much money *alone*, but a receipt for a certain promissory note which when paid would be in full *settlement* of all claims against the respondents on account of the house and premises now the subject matter of this suit. It would be difficult to make the terms of an acquittance more comprehensive and binding. This receipt shows on its face, that it was the work of a compromise; its very language is irresistible proof of this fact.

No argument can be deduced (to aid the complainant's case,) from the fact that he now sets up a pretext, that he was *mistaken*, and *misunderstood*, and *misconstrued* the "*term alterations*," used in the letter of his agent. The proof furnished by the complainant shows that the construction to be given to it was agreed upon by the parties after discussion and reflection; and without such agreement, the *compromise* would not have been accomplished. They agreed to its meaning in order to effect a compromise; to come to a settlement in order to satisfy an urgent creditor of the complainant.

It is wholly immaterial whether the sum now claimed is for *alterations* or *additions*. The respondent by his agree-

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ment was to pay for the expense of completing the building; and this the complainant knew. The term "*alterations*," used in the agent's letter, was fully discussed by complainant and respondent, and its meaning agreed on, before the settlement and compromise took place; and it was upon this agreed construction the settlement between the parties was made; without such agreed construction no settlement would have been made, and it was to accomplish and effect a settlement, that a construction was agreed upon.

The complainant knew, (and upon this point there could be no mistake,) that by the agreement and contract the respondent was to pay for the completion of the building. If he had a doubt of the true meaning of his agent's letter, and of the amount due from the respondent, he had the means of informing himself by applying to his agent. He did not apply, but urged upon the respondent a settlement upon the basis of the construction given by both parties to the meaning of the letter of complainant's agent, and the complainant executed to the respondent full and complete acquittance and discharge from all *claims* in regard to the subject matter of this suit.

When a party has thus acted with the means of information within his reach, and *peculiarly* within his power and control, and within the keeping and knowledge of his own agent, can a court of equity interpose to relieve him on the ground of *mistake*? See the case cited under the fifth proposition of this brief. In most of the cases where the courts of equity have interposed to reform written agreements, or to relieve parties on the ground of *mistake*, it will be found that the party in whose favor the mistake has occurred was himself complainant seeking the enforcement of a contract or agreement, and applying to the court for their specific execution. In such cases the courts of equity very properly say to them: "If you wish our aid, you must submit to do equity, and what shall be just and proper. You must re-

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lieve the defendant from the hardships of the mistake that has occurred in the matter."

As before stated, the instances of mere mistake of facts upon which a court of equity will *actively relieve*, arise where the party applying on that ground was *alone* under mistake at the time of the transaction. If the mistake is *mutual*, no relief will be given. See upon this point the authorities cited under the third head in this brief. The reason for this rule in courts of equity is too obvious to require comment.

It cannot be pretended that in this case, the mistake (if any,) was not *mutual*. The evidence of the complainant shows, that when the parties met in Baltimore, there was *mutual* ignorance as to the amount that had been expended in the completion of the building. It is not pretended that the defendant was in the possession of any information which he withheld from the complainant, or that he used any *undue advantage*, or made any *concealment*, or did any other act that was not fair and unexceptionable. If in this case the respondent had paid a larger sum in the settlement and compromise than the completion of the buildings had cost, I do not think, on the proof in this case, that a court of equity would decree a refunding of the excess on the ground of *mistake*.

In this case the answer of the defendant sets forth that the complainant sought the defendant and *urged* upon him a settlement; that the sum paid in the settlement was that named by the complainant, and after hesitation, *consented* to by the defendant; that the settlement was full and final, and so intended by the parties, as shown by the receipt. This answer is *vaguely* in part contradicted by the testimony of the complainant, but not *so contradicted* as to amount to what is termed in chancery proceedings a *denial*. The rule in equity that requires two witnesses, or one witness with strong corroborating circumstances to outweigh the answer of a defendant, leaves the answer in this case in full force.



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7. The distinction between *ignorance* and *mistake* is broad and well defined. If one shall act in *ignorance* of the true state of things, when he has the means of informing himself, a court of equity will not give relief. A party asking relief and the aid of a court of equity on that ground, must show that he *could not have obtained the necessary information with due diligence*. 15 Bevan, 151; Adams' Eq., 373, note v; 4 Johns. Ch., 566; 1 Eden, 64; 4 Maryland Ch. Decisions, 835; 9 Vesey, 23; Jeremy's Eq., 366; 2 Atk., 592; 2 Ball & B., 171; 1 Bro. Ch. Cases, 158.

The evidence in this case shows that the complainant did not make a mistake; his own testimony shows it. From his own showing it would seem that he acted in *ignorance* of the true state of things, when he had abundant means of informing himself by application to his own agent and correspondent. A court of equity can give him no relief from the consequences of his own act. See authorities above cited.

8. A bill for relief against a mistake in the settlement of accounts must *allege* the matter of mistake *specially*, and the allegation must be strictly proved. It must be as *conclusively proved* as if the respondent had *admitted* it in the answer. 1 Johns. Ch., 252; 6 Ala., 518.

It is insisted that the bill in this case does not allege the matter of mistake *specifically* and prove it.

It speaks of the complainant's *ignorance* of the true state of his accounts with the respondent, and of his settlement with respondent, in *ignorance* of his claims against the respondent, but it does not specially allege the matter of mistake and prove it. The answers of the respondent deny that there was a mistake, but distinctly allege that the settlement was made to accommodate the complainant, and at his solicitation, and insists that it was a *compromise* of the matters in dispute between the parties, and was intended to be final. This answer of the respondents is uncontradicted by the proofs in the case, and should be conclusive on the point.

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9. The complainant, Hayward, not only sanctioned and consented, but bargained and stipulated with the respondent to pay H. R. W. Andrews for the lots of land, and he is now *stopped* from setting up any claim or title by way of *lien*, either equitable or otherwise, in order to defeat or encumber the purchase. The acts and declarations of the complainant at the time of the payment and settlement are inconsistent with the evidence he now offers, and the title or claim which he now sets up, and if allowed, is an injury and injustice to the respondent. 16 Maine, 146; 21 Maine, 137; 6 A. & E., 469.

In the case of Hatch vs. Kimball, 16 Maine, 146, it was held: If one pays to the holder of a mortgage the amount due thereon, and takes a deed of quit-claim, equity will hold the mortgage extinguished or outstanding, as the interest of the party paying the money may require. It is insisted on like principles of equity, that as LaTrobe paid for the lots the amount due on them for their purchase from Andrews, the *lien* of Hayward became extinguished, and that this would have been the case if the *lien* had been by mortgage, and not an equitable *lien*, which is not favored in equity.

M. D. Papy for Appellee.

When property in controversy is within the limits of the State, and the claimant resides abroad, the Chancery Court has an undeniable jurisdiction over the case. 3 Gill & John., 504; 1 J. J. Marsh., 474; 3 Dana, 544; 15 Mass., 357.

Jurisdiction is founded either upon the person being within the territory or upon the thing being within the territory. Story's Confl. Laws, p. 450, sec. 539; *ib.*, sec. 551.

As to relief being granted upon the ground of mistake, the court will open settlements made by mistake, although receipts in full have passed, &c. 4 Desau., 122; 9 Conn., 406; and see 1 Story Eq., secs. 142, 152 and 155.

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Money paid by mistake can be recovered back by bill in equity. 3 Monroe, 82.

A chancellor will correct mistake made in settlements, and cancel notes executed in consequence. 6 J. J. Marsh., 501.

It is one of the most familiar duties of a court of equity to relieve against mistake, especially when it has been produced by the representations of the adverse party. 15 Peters, 271.

A clear mistake, in making partition and settlement of an estate, as to its liability for a supposed debt, is a ground for opening mutual releases executed by the parties, where it appears that the settlement was not a compromise or speculation; it makes no difference that it is uncertain whether the mistake was one of law or of fact. 1 Bailey's Eq., 343.

A receipt of payment, though there is no fraud, if obtained by mistake, does not bind. 25 Georgia, 546; 5 Arkansas, 558.

Where a party makes a misrepresentation of fact, upon the faith of which the other acts, it is immaterial in a court of equity whether he knew of its falsehood or made the assertion without knowing whether it were true or false. 15 Maine, 332.

WESTCOTT, J., delivered the opinion of the court.

The grounds upon which a reversal of the decree is prayed in this case, may be divided into two classes: First, those which go to the jurisdiction of the court; second, admitting the jurisdiction, those which deny the right to relief upon the facts as they appear from the pleadings and proofs. The questions made as to jurisdiction may be again divided into those which arise from the residence and citizenship of the parties, and those which relate to the subject matter of the suit, or which raise the question whether the matters set up in the bill are not cognizable in a court of law, rather than

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a court of equity. The first ground (set up by way of plea,) is, "that the Circuit Court had no jurisdiction to hear and determine the cause, because complainant and respondents were residents of the State of Maryland, and both complainant and respondents resided in another and the same State—the State of Maryland—and were not within the jurisdiction of the State of Florida and the Circuit Court of the Second Judicial Circuit for the County of Leon at the commencement of this suit."

If the proceedings are *in rem*—if there are equities arising from contract or by operation of law, by virtue of which a party is entitled to subject specific property, real or personal, to sale for the purpose of satisfying a debt, then the courts of the State in which that property is situated have unquestionably the jurisdiction to grant relief, and that both the parties plaintiff and defendant are citizens of another and different State from that in which the property is situated does not divest the jurisdiction. Whenever it becomes necessary for the decree to act upon the thing, upon the particular property, the jurisdiction attaches to the thing, abides with it, and can only be brought into action by suit where the thing is. 4 Mon., 436. With reference to State courts, it is also true that wherever a citizen of Florida could maintain a suit in the courts of Florida against a citizen of Maryland, there also could the citizen of Maryland maintain the same suit.

The relief prayed for in this case is for the sale of property situate within the jurisdiction of the court, and the application of so much of the proceeds of sale as is necessary to satisfy an alleged lien, and while the plaintiff admits that the courts of chancery in this State would not have jurisdiction to make a decree for the simple establishment of a claim or demand in favor of a citizen of Maryland against a citizen of Maryland, or like decrees, yet we see no necessity for examining in this case that question. The decree sought, the relief prayed here, is for the sale of specific property within the

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jurisdiction, and if there are such equities set up in the bill and established by the proofs as entitle plaintiff to a sale of the property, that settles the question involved in the case.

The next objection to the jurisdiction, which, like the one just stated, involves a consideration of the facts, is, that if the plaintiff has any claim or demand, it is a claim or demand for work, and labor, and materials, for which he has a complete and adequate remedy at law.

This suit is based upon the following agreement:

*Memorandum of agreement between William R. Hayward
and Letitia G. Holladay.*

The party of the first part agrees to sell to the party of the second part his lots, numbers 98 and 99, in the north addition of the city of Tallahassee, with the improvements now in course of erection thereon, on the following terms, viz: The lots are to be estimated at one thousand dollars, and the dwelling house and kitchen are to be completed by the said party of the first part, as heretofore contracted for by him, the front and back piazzas to the dwelling included.

The said party of the second part binds herself to pay to the said party of the first part the full cost of said dwelling-house and kitchen, as shall appear from bills rendered by him, with one thousand dollars as aforesaid for the lots, in two payments, one of twenty-five hundred dollars on the first day of July next, and the balance in twelve months from the date of this contract, with interest at eight per cent. per annum from the first day of July next.

Witness our hands and seals, this 20th day of March, 1861.

| | | | |
|----------------|---|----------------------|---------|
| In presence of | { | WM. R. HAYWARD, | [L. S.] |
| W. K. BEARD. | | LETITIA G. HOLLADAY, | [L. S.] |

After Hayward had executed a deed for the lots and premises to Mrs. LaTrobe, under the impression that he had been paid all that was due him under this contract, he now claims that there was a mistake in the settlement; that there was, in fact, a larger sum due than he received, and for the balance so alleged to be due he asks the court to subject the

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property to sale, and to apply so much of the proceeds thereof as is necessary to settle this unpaid balance of the purchase money. By an examination of the contract, it will be found that there is no difference between the lots and the improvements to be constructed; the lots were to be estimated at one thousand dollars, and the improvements to be constructed at their actual cost, and the payments agreed to be made, and the payments actually made, were made generally under the contract, and there is nothing in the proofs to show that either party intended that any portion of any payment should go to extinguish the debt of LaTrobe and his wife to Hayward for the lots, but it was to go as a general payment upon the entire indebtedness, which entire indebtedness could not be ascertained until the work was completed. Two lots and contemplated improvements were agreed to be sold, and the full price was to be fixed at the actual cost of the improvements and an estimated value of the lots. If the settlement in this case was made under such circumstances as would require a court of equity to open it, then the ascertained balance stands as a balance of the purchase money due upon the sale of the real estate.

This is not a case where a party, having a title to and being in possession of land, employs another to furnish materials and construct a building thereon. Whatever may be the rule in such a case we need not inquire, for this is not that case. Here the party having the title to the land and the possession, and having contracted for certain improvements, agrees to sell the land and the contemplated improvements to another, and the amount to be paid is to be the actual cost of the improvements and a previously estimated value of the land. Hayward, in this case, did not furnish work, labor and materials for buildings to be constructed upon the land of Mrs. Holladay. He was improving his own real estate, his own property. The title was in him. He had done nothing more than agree to sell, upon certain terms, both the lots and improvements. Upon a sale of a

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lot and improvements, we know of no principle of law which restricts the vendor's lien, where there is a balance of purchase money due to the value of the soil exclusive of the improvements. What was here agreed to be sold was the soil and contemplated improvements completed—a precisely similar case in principle to any ordinary sale of improved real estate.

The next ground set up in the petition of appeal denying the existence of any lien, and incidentally the jurisdiction of a court of equity, is, that "there was no vendor's lien, inasmuch as the proofs in the case show that the lots of land upon which the building was erected were paid for by the defendant, Chas. H. LaTrobe, before the institution of this suit, and a deed was executed by the complainant to the defendant for said lots of land."

This ground, as stated, must be taken to mean that LaTrobe *had paid Hayward* for the lots, and it depends entirely upon the question as to whether there was any difference between the lots and improvements, and whether any payment was made for the lots exclusively. The execution of the deed does not destroy the lien, as a matter of course. We do not propose to determine what the result would be in the event the parties had made a distinct payment for the lots, for, as we have already seen, such was not the fact as between Hayward and LaTrobe. It would not, however, be doing justice to the argument of the appellant to dispose of this ground in this way, as in argument it assumed an entirely different aspect. It was insisted that there was nothing due for the lots from Hayward to the party from whom he purchased them (Andrews.) as the note given in the settlement by LaTrobe to Hayward was by Hayward transferred to Andrews in payment of the sum due Andrews for the lots.

The note given in the settlement between Hayward and LaTrobe purported to be for the last installment "due upon the lots, with improvements thereon."

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Neither in the bill nor answer is it stated that the note thus given by LaTrobe and wife was transferred by Hayward to Andrews in payment of a sum due Hayward to Andrews for the lots. All that appears upon the subject is a statement in the answer that, after the settlement by note, LaTrobe was asked by Hayward if he had any objection to the note being transferred to Andrews, "to whom complainant (Hayward) seemed to be indebted on an old account," and that no objection being made, the note was transferred. It is, however, stated in the deposition of Hayward, that he transferred the note to Andrews in part payment of the lots, and that he had never been called upon to take up the note. Without any reference, however, to the fact that no such matter is set up in the answer, it is plain that if any lien exists for the sum found to be due by the master *over and above the amount of this note*, the transfer of this note of LaTrobe to Andrews does not operate to destroy the lien for the sum due over and above the amount of the note.

If it had been an actual payment in cash, it would have operated only to destroy the lien to the extent it settled the debt upon which that lien was based. We might leave this question with this remark, but as this matter was insisted upon with considerable earnestness in argument, we deem it advisable to state with more accuracy the law applicable to the case, as it appears to us in this respect. The lien for the purchase money in a case of this character exists by virtue of two facts: first, an indebtedness of vendee to vendor; and, second, because that indebtedness represents the balance of the purchase money due upon a sale of real estate. At law the estate passes, but in equity the vendor retains a lien until the whole of the purchase money is paid, unless the estate has been impressed by some equity superior to the vendor's; for instance, if it has become the subject of a *bona fide* purchase for value without notice.

Had Hayward retained the note in this case, it cannot be doubted that his lien, if it existed at all, existed for that sum;

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but having transferred the note to Andrews, who accepted it as a payment of an indebtedness due him, Hayward does not seek to subject the land to sale for any portion of LaTrobe and wife's debt to him which this note represented. What he claims is the balance of the indebtedness over and above that sum. Hayward's indebtedness to Andrews, who was his vendor, can in no manner be the measure of Hayward's lien as against LaTrobe, Hayward's vendee. Hayward may have sold it for twice what it cost him, and it would be strange indeed if Hayward's vendee could destroy his equity by paying Hayward's vendor a sum equal in amount to one-half of the purchase money which was due Hayward.

Whether the transfer of the note by Hayward to Andrews, or the sale to LaTrobe under the circumstances of this case, destroyed Andrew's lien to that extent upon the land in the hands of LaTrobe, is a question not raised here.

Andrews is no party, and we can say nothing of that question. It is plain that it did not affect Hayward's rights beyond the amount for which the note was given, and to that extent H., whether entitled to it or not, asks no relief.

Having disposed of these preliminary questions, it only remains to determine whether the settlement and receipt in full was executed under such circumstances as authorized the court to open it, and whether, being opened, there was anything due.

The parties made a final settlement of the matter of the purchase of this property under the agreement stated, and Hayward executed a receipt as follows:

"Received, Baltimore, Maryland, July 21, 1865, of C. H. LaTrobe and Letitia G. LaTrobe, one promissory note, dated July 1, 1865, and due July 1, 1866, for one thousand and ninety dollars, which, when paid, will be in full settlement of all claims against them on account of the house and premises situated in the north addition of the town of Tallahassee, State of Florida, numbers of the lots being 98 and 99, pur-

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chased from me by said C. H. LaTrobe and Letitia G. LaTrobe, and for which I hereby pledge myself to give them a deed in fee.

WM. R. HAYWARD."

The bill seeks to open this receipt, it being alleged, first, that the note was for an amount much less than was really due; second, that such result was not the intention of the parties, and that the intention, which was to pay the amount due or to approximate it very nearly, was not accomplished, through a mistaken construction of a letter of the agent of Hayward before the parties at the time of the settlement; and, third, that at the time the settlement was made, LaTrobe incorrectly represented a material fact as being within his knowledge, concerning which fact Hayward was entirely ignorant; that is to say, one of the questions necessary to be considered, and actually considered in the settlement, was the character and value of certain alterations made by LaTrobe in the original plan of the building as contracted for by Hayward; that while in point of fact they were considerable in amount, LaTrobe represented, or by his acts led Hayward to believe that they did not amount to much, being, as he said, only arching a few doors, and some other little things, not amounting to much, and that Hayward, being entirely ignorant of the extent as well as the cost of the alterations, was thus induced to close the matter and settle.

The bill, in reference to the first point, sets up a distinct sum as being due. The answer alleges that the defendant has no personal knowledge of the amounts paid for the house by complainant, and neither admits nor denies that the sum complainant claims he expended was expended. It sets up further, that unskillful, idle and ignorant workmen were employed by complainant, and that from this cause the cost was enhanced. To what extent, with reference to the sum claimed over and above the amount of the receipt, is not stated. This answer, in so far as it is responsive to the bill, amounts to neither a denial nor admission of the sum claimed

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to be expended under the contract by complainant. The effect of it, therefore, is simply to put the plaintiff to the proof of the fact alleged in his bill. The allegation as to the employment of unskillful workmen is an affirmative allegation in opposition to the bill, and the defendant, where there is a replication in, as in this case, is as much bound to establish such allegations by independent testimony as the plaintiff is to sustain his bill. 2 Dan. Ch. Pr., 841.

The testimony in the case does not establish this allegation of the defendant. The account of the plaintiff for the actual cost is proved before and allowed by the master, to whose report there was no exception by the defendants, and the sum due at the date of the settlement is shown to be largely in excess of the sum for which the note was given and the settlement made. It is, therefore, the opinion of the court, that the note was given for an amount less than what was due, and that the real amount due was the sum found by the master.

The second essential fact is, that it *was the intention of the parties*, one to pay and the other to receive what was due, not in precise figures, perhaps, but at least to approximate the balance; in other words, it was LaTrobe's intention to pay the cost of construction, and Hayward's to receive the cost, and to carry out their original agreement in good faith, and that such intention was disappointed by a mistake. Neither party intended to take the chance of losing or making such a considerable sum as the difference turns out to be.

The bill sets forth that shortly after the execution of the agreement (March 20, 1861,) Hayward left the State of Florida, leaving his father his agent; that on account of the war he did not receive any information concerning his interests in Florida until July, 1865, when he received a letter from his agent setting forth the payments made by LaTrobe (\$5,000,) and then went on to say, "he" (meaning the defendant, Charles H. LaTrobe,) "owes you" (meaning plain-

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tiff) "for the lots, building of house, &c., and the alterations, which Mr. Ball estimates about \$1,000;" that upon the receipt of this letter he sought LaTrobe, who was then in Baltimore, to have a settlement; that defendant stated "he had no idea what was the amount of the balance due from him;" to which plaintiff replied, that perhaps the letter received by him a few days before from his father might assist them; that he then read the portion of the letter quoted above, and added that it seemed to him that the \$1,000 mentioned therein might refer alone to the price of the alterations as estimated by Mr. Ball, the carpenter, which would of course leave unpaid still another \$1,000; that defendant vehemently objected to this construction of the sentence; said the \$1,000 could not refer to the alterations; they, said he, "were only arching a few doors and some other little things, which could not amount to much; to which your orator replied, well, I suppose it must mean the whole balance is only \$1,000," and that upon this construction given by the defendant to the language of the letter, and finally concurred in by the plaintiff, a settlement was then and there made.

The answer admits that defendant was called upon by plaintiff in 1865, with this letter of his agent containing this sentence, and that the plaintiff construed it as stated in the bill; that the defendant stated that this could not be the construction, as no such amount of extra work had been done; that the plaintiff then asked him if he thought the \$1,000 could mean the total balance due on the house, to which he (LaTrobe) replied that he thought \$1,000 would cover the whole sum due according to the agreement.

The testimony of Hayward confirms the statements of the bill, and LaTrobe, in a letter of his in evidence, states that at the time of the settlement he thought that a balance of about \$1,000 would square us (meaning the parties to these accounts) up. It is unnecessary to comment at length upon the admission of LaTrobe in his letter, and the admissions

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of the answer construed with reference to the matter of the bill.

It is plain that the parties intended to settle, approximating the balance due, and that neither intend to risk the chance of such a loss as has occurred. The receipt was given under the mutual impression that it covered the sum due, and that that was meant by the letter of the agent. Plaintiff intended that he should get what he was entitled to, and LaTrobe assured him that he (LaTrobe) thought that \$1,000 would cover the whole sum due according to the contract. It is the opinion of the court, therefore, that it was the intention of the parties to settle according to the original argument, and the failure so to do was occasioned by a mistaken construction of a letter then before them.

When the general character of the transaction is considered, this view is strengthened. LaTrobe was to pay nothing more under the agreement than what it cost Hayward, who was simply building the house and paying for it with LaTrobe's consent; Hayward was to make no profit. The alterations made in the original work and the extra work done by the carpenter, were done by LaTrobe's directions. Such is the charge in the bill and the proof sustains it. Under such circumstances it is not reasonable to presume that either of these parties seeking to do right would desire to do less than the agreement required.

The third fact stated in the bill, which constitutes an essential ground for the relief prayed, is that at the time the settlement was made, LaTrobe incorrectly represented a material fact, necessary to be considered and actually considered in the settlement as being within his knowledge, concerning which fact Hayward was entirely ignorant, and upon which representation Hayward relied in the matter of settlement, LaTrobe having greater knowledge upon the subject. The bill sets up Hayward's ignorance of everything in reference to the construction of the house, so far as there were alterations or extra work, and that such alterations and

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extra work were done under the directions of LaTrobe. The admissions of the answer and the proof fully established this allegation.

The bill further sets up that Hayward, when he approached LaTrobe for a settlement, construed the letter properly, and the answer admits that such was Hayward's construction, its language being that the complainant construed the sentence to mean "that the defendants owed \$1000 for extra work done on the said house at the instance of these defendants." The answer states further, that the defendant, LaTrobe, insisted at the settlement that this construction could not be correct; "whereupon complainant asked LaTrobe if he thought the \$1000 could mean the total balance due on the house? to which he replied that he thought \$1000 would cover the whole sum due according to the agreement," adding that he had no knowledge upon the subject and spoke only from his judgment as to the probability in this connection. The answer states that the complainant then asked him, if he would settle on the supposition that \$1000 would close the business. This is what occurred between the parties according to the answer. The alleged addition to the effect that the defendant had *no knowledge upon the subject*, is inconsistent with defendant's admissions in the answer, as he expressly states that he had knowledge of the work done, and of the manner in which it was done, and the proofs entirely negative this statement. The proofs show that LaTrobe knew everything about the alterations except the precise charge for them; he knew their character and extent. Besides, the evidence does not show that LaTrobe represented to Hayward that he had *no knowledge* upon the subject. The mistake was discovered by Hayward upon the receipt of his agent's next letter, and he wrote at once to LaTrobe advising him of it, asking a fair adjustment of the matter. Hayward in this letter calls LaTrobe's attention to the fact that LaTrobe at the settlement assured him that the \$1000 could not refer to the al-

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terations alone, for they were only some arches and little matters which could not have cost much, and Hayward in his testimony states that this was LaTrobe's representation, and LaTrobe in his answer to this letter of Hayward's says: "I thought the interpretation of the letter to the effect that a balance of about \$1000 would square us, correct. You asked me if I thought the alterations could have covered \$1000. I smiled at the idea; it was impossible." Taking this in the connection in which it occurs, it is an act equivalent to an express declaration that the alterations could not amount to that sum. Hayward knew that LaTrobe was advised fully of the character and extent of the alterations, and LaTrobe knew that Hayward was not so advised, and such an act in response to the inquiry made amounted to more than an assurance that the alterations did not amount to that sum; it expressed surprise that such a view should even be entertained by Hayward as a possibility.

The only remaining question as to this point of the case is whether the alterations were not considerable. An itemized account of the alterations amounting to about \$1000, was proved before the master and allowed. There is no proof to establish the allegation in the answer that the work was done in an unskilful manner, or that the charges were greater in amount than they should have been. The master's report must therefore be accepted as showing the true balance due, as well as the correct sum for alterations.

We thus see that the case made by the bill, and all the essential facts upon which the prayer for relief is based, is fully made out, and the only remaining question is whether the case thus presented is one which justified the decree rendered.

The grounds upon which appellant prays a reversal of the decree not before considered, and which involve a consideration of the case as it appeared at the hearing, are as follows:

Fourth—Because the complainant, Hayward, and the res-

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pendent, Charles H. LaTrobe, had a full settlement of the matters in controversy between them, and full receipt and acquittances were given and accepted by the parties, and the court erred in not deciding this settlement to be final.

Fifth—Because the parties had, before the institution of this suit, compromised, adjusted, and settled the matters in dispute between them, and full and final receipts had been given and accepted, and the court erred in going behind this compromise.

Sixth—Because if there was a mistake made in the settlement as to the facts upon which the settlement was made, it was a mistake of both parties, a mutual mistake, and the court erred in opening the settlement to correct such mistake.

Seventh—Because the pleadings and proofs in the case show the complainant acted in ignorance of the true state of things when he had the means of informing himself.

Eighth—Because the bill does not allege specially the matter of mistake and the proofs establish it.


Ninth—The court erred in not deciding the complainant Hayward estopped by his deed and receipts to LaTrobe from setting up any claim or demand against the lots of land named in the bill, or from setting aside the settlement made in this case.

In respect to the fourth and ninth grounds we have only to remark, that admitting the settlement, the receipt, and the deed therein alleged to exist, brings us no nearer to the solution of the question than we were before. The question whether such settlement and receipt were executed under such circumstances as require they should be opened, is still left undetermined. In respect to the fifth ground, we can only remark that the case is not one of compromise, in the sense and meaning of that term as used in the authorities, when stating the general principle that compromises of conflicting rights when unaccompanied by fraud are final. Compromise involves in most cases a difference between the

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parties, a controversy based upon conflicting claims, and it involves in all cases the idea of concession, because no settlement in strict accordance with right can be called a compromise. Now, unless the bare relation of debtor and creditor, where there is no dispute or difference as to what is the contract of the parties or their purpose, necessitates a difference or controversy, then there is neither difference nor controversy here, and the only matter of concession made in this case was as to the interest, and that concession was distinct and independent from anything which occurred in reference to the principal amount for which the parties concluded to settle. The answer in this case admits that nothing was said of the interest until the principal sum was fixed, and that then at the request of the defendant, complainant consented to charge only half-interest. No consideration of interest entered into the matter of adjusting the principal sum due, and it cannot affect that question. So far as the parties expressed themselves, they disclosed a mutual intention to settle according to the agreement. They did not suppose they were acting in ignorance of rights or facts; they knew the provisions of the agreement which was the measure of their right, and they came to a settlement, each avowing an opinion and belief that what they did was in substantial conformity to the agreement. In this opinion they were in error, and the error was founded in mistake. We treat this branch of the case first, as though there was mutual and equal ignorance of the character and extent of the alterations, which defendant contends was the case, (although it was not,) to show that even in this aspect of the case there was no compromise.

The sixth ground is that the mistake made was a mistake of both parties, a mutual mistake. It is unnecessary to say anything more in reference to this ground than that the solitary fact of mutuality in the mistake is no sufficient answer, for there are a class of cases in which it is essential that "the mistake should be on both sides," (Adam's Equity, 71.)



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and an examination of the cases will show that in almost all cases where there was a pure mistake, as distinct from an error in judgment as to the values, and where a relief has been granted otherwise than upon the ground of fraud, the mistake has been mutual.

The seventh ground is because the complainant acted in ignorance when he had the means of informing himself. Where a party, having the means of information within his reach, makes a contract in ignorance of the value of the subject matter of the contract, the general rule is unquestionably that a court of equity will not set aside the contract, re-estimate the value, and fix the amount to be paid at what is conceived to be the proper value.

In this class of cases, the party *knows he acted in ignorance, and, strictly speaking, there is no mistake*. What he loses, he has lost through culpable ignorance, not mistake. So also when a party contracts with another ignorantly, supposing that he acquires something of greater value than it afterwards turns out to be, a court of equity will not, upon this ground alone, permit him to receive the value which he ignorantly conceived he was getting under the contract. The case of *Ainsley vs. Medleycott*, 9 Ves., 23, cited to sustain the seventh ground, was a case of this kind. There, the party conceived ignorantly that four thousand pounds, secured under a certain settlement, was a sum of money; *but no such representation* having been made to him by the other party, the court held that because he was in error in his conception, and it afterwards turned out to be stock and not money, a court of equity would not give him a decree for money instead of stock.

There is no such general principle as that equity will give no relief because the party *acted* in ignorance, when he might have been informed. Everything depends on the character of the act in other respects. Suppose the act, though without knowledge, or an attempt to acquire it, is

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induced by a false representation of one, having superior knowledge, occupying a confidential relation?

The parties to this settlement, though really ignorant of the sum due as between them, acted, believing that they had full knowledge of it; the one believing that he was paying, and the other that he was receiving, the proper sum. This belief that they had full knowledge was an error, and that error was induced by mistake in the construction of a sentence. No mistake of this kind could create an equity if this is the rule, for every mistake of the class which occurred in this case involves the belief upon the part of the parties that they had knowledge, and the existence of the fact of ignorance. If the parties in every such case sought information when they believed they had full information, and such information could be obtained, they would always acquire the information and could never make a mistake, because a party cannot knowingly make a mistake. If the parties in this case knew that the alterations cost \$1,000, how could they have made the mistake in construing the letter? When the act is of the character disclosed in the cases cited to sustain this ground, accompanying ignorance will not entitle the party to relief; but when the ignorance is of the character disclosed here, and the act is of the character disclosed in this case, we must apply the rule applicable to like cases, which rule we will declare after disposing of the remaining grounds set up in the petition of appeal, and in that connection the court will show the distinction between the cases cited by appellant and this case.

The remaining ground not considered is, "because the bill does not allege specially the matter of the mistake relied upon and the proofs established it." We deem it entirely unnecessary in this connection to repeat the allegations of the bill in this respect. It does specially and particularly allege the mistake, and the answer admits it. The answer admits that the sentence referred to was in the letter, ad-

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mits the construction given, and it is established beyond doubt that the construction so given was a mistaken one, and that the error in the settlement was the result of this mistake.

Having disposed of these matters set up in the petition of appeal, there is nothing further for our consideration, except the question whether the receipt was properly set aside and the settlement opened.

There are two aspects in which this matter has been presented by appellee.

First. In the aspect of mutual and equal ignorance of the additions and alterations made in the original plan of the house, the intention of the parties, and the error in the settlement resulting from the mistake in the construction of the sentence in the letter.

Second. In the aspect of a difference in the knowledge of the additions and alterations, of ignorance on the part of Hayward, of knowledge on the part of LaTrobe, the reliance placed in LaTrobe by Hayward on account of the superior knowledge, and the act of LaTrobe inducing and leading Hayward to believe that the alterations or additions could not amount to but little, and to accept LaTrobe's construction of the letter.

In the first aspect, it is contended that the mistake is clearly made out; that the intention of the parties is clearly established; and admitting (for the sake of argument) mutual and equal ignorance, it presents a case which a court of equity will relieve. In the second, it is contended that the act of LaTrobe in reference to the value of the alterations, a material fact in the settlement, and Hayward's acting under erroneous impressions induced by LaTrobe's conduct and declarations, presents, with the other facts independent of the mistake, a case which a court of equity will relieve.

It is the opinion of the court that in either aspect, the case is fully made out, and it is the further opinion of the

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court that in each aspect a court of equity must open the settlement.

If the parties were mutually ignorant, then the case presented is one where, through a mutual mistake in the construction of a sentence in a letter, the parties failed to accomplish their true intention and design, viz: the one to receive, the other to pay substantially what was due under an antecedent written agreement. In such a case, for a court of equity to perpetuate the mistake, and to make one party lose and the other gain, would be little less than a court of equity making itself the instrument to perpetuate a wrong. As remarked by Mr. Story, (*Story's Eq.*, 155,) a court of equity would be of little value if it must leave mutual mistakes, innocently made, to work intolerable mischief, contrary to the intention of the parties. It would be to allow an act originating in innocence to operate ultimately as a fraud by enabling the party who receives the benefit of the mistake to resist the claims of justice.

In the case of *Corking vs. Pratt*, (1 Ves., sr., 400,) there was an agreement between mother and daughter as to the distribution of the personal estate of the father. Upon the daughter's marriage, the agreement was consented to by her husband. Upon the death of the daughter, her husband, as administrator, brought a bill to set aside the agreement and to have the distributive share set aside. The master of the rolls set aside the agreement upon the ground that it appeared afterward that the personal estate amounted to much more. Says the master of the rolls, "the party will be permitted to come here to avail himself of that want of knowledge, not indeed in the case of a trifle, but some bounds must be set to it. The daughter would be entitled to five or six hundred dollars more, which is very material in such a sum as this and a ground for the court to set it right. The daughter did not act on a composition and to have ready money, but took this as her full share; and if

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it appears not so, the court cannot suffer the agreement to stand."

This case is much stronger and goes much further than the decree in the case now before the court. In Corking vs. Pratt, it was a voluntary agreement in which both parties conceived the daughter received what was her share. In this case, there was no independent consideration, and the parties conceived that they were settling according to their antecedent agreement, which fixed their rights. So far they are similar, but the difference in favor of this case is, that in Corking vs. Pratt, the daughter simply acted under a thorough misconception of the amount and the value of her right, (3 Bro. C. C., 376, note 1,) while in this case, this, in respect to the matter of alterations, was not only true, but that misconception was occasioned by a *mutual mistake of the parties*, not by a known ignorance of the one party Hayward. The daughter in Corking vs. Pratt knew she was acting in ignorance, but Hayward when he acted believed that he was acting, not in ignorance, but with a full knowledge of his rights, and that belief was the result of mutual mistake.

In the case of Hare vs. Beecher, 12 Simons, 396, R. Beecher executed a bond to secure an annuity of one hundred pounds to Mrs. Turton, and at the same time executed an assignment of a policy of insurance on M.'s life to certain parties to secure the payment of the annuity secured by the bond. M. died during the life of R. Beecher. Robert Beecher subsequently died, and his brother Richard took out administration, and was in arrears in paying the annuity to Mrs. T. She threatened suit. *Both parties being under the impression that the intestate during his life had, upon his death, received the money secured by the policy and appropriated it to his own use, came to a compromise.* Mrs. T. gave a full release to the administrator from all claims and demands in respect of the annuity for one hundred pounds and the securities for the same. It was subsequent-

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ly discovered that the policy had been collected by the intestate and the funds deposited to the credit of the annuity with certain bankers.

The chancellor set aside the release and made the amount of the policy applicable to the annuity. Here, the mistake was mutual, the result of ignorance upon each side, and the matter is stated by the reporter to have been a compromise. This case, in the opinion of the court, is not so strong a case as the present one. If the parties had not only been ignorant, but in addition there had been a letter capable of the construction that the money had been appropriated by the decedent, and upon this construction the compromise had been arrived at, and such construction was a mistaken one, there would have been a greater similarity; but even then the intention to pay the full amount due would have been wanting, which is a material fact in this case. This case was decided in 1842.

In *Barnett's Adm'r vs. Barnett*, 6 J. J. Marshall, 500, the administrator made a settlement upon the supposition that his intestate had entered a credit on account of a particular demand, and the court held that when it was ascertained that the settlement had in relation thereto had been made under erroneous impressions as to payments entertained by both of the parties, the administrator would not be held to pay balances thus found erroneously against him.

In *McCrae vs. Hollis*, 4 Desau., 122, the court held that a court of equity will open settlements made in mistake, though receipts in full have been given and the note taken up, and will allow the larger sum established by evidence. In that case, there was a note for \$291.15. In making the settlement, the calculation of the amount due on this note was endorsed on it, and it began with the sum of \$191.15, instead of \$291.15. Here was a pure mistake in transferring the amount of the note from its face to its back in making the calculation. This mistake disappointed the intention of the parties, and made one pay less than what was due.

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What is the difference in principle between that case and this? Here was a mistake in the construction of a sentence in a letter. They are both equally mistakes, disappointing the intention of the parties. They are mutual mistakes, and it would be as manifestly wrong to perpetuate the results of the mistake in the one case as the other. In such cases as these, if the mistake is not mutual, the transaction involves a fraud; for if a party sits by expressing an intention to pay the full amount due, and encourages and sanctions what he knows to be a mistake upon the part of the other party, which results in his making a considerable sacrifice, it is a fraud.

In the case of *Gist vs. Gist*, 1 Bailey's Eq., 346, all the parties interested in an estate executed mutual releases, and came to a settlement upon the supposition that there was a debt due the State. It turned out subsequently that there was no debt due, and the settlement was opened upon the ground of mistake, the chancellor remarking that it was plain that the parties could not have contemplated the chance of such an event as this.

The principle announced by the High Court of Chancery of Maryland, in *Hall and Gill vs. Claggett*, 2 Maryland, Chancery Decisions, 152, is applicable to this case. In that case a settlement was alleged not to conform to an agreement upon which it was based, and that this was the result of mistake, and the court say, that in the event the mistake was established, the settlement would have been opened and made to conform to the agreement.

In 9 Conn., 406, *Fuller vs. Crittenden*, the parties had agreed that the expenses incurred in obtaining a mail contract should be paid. They had a settlement, and a receipt in full was given. It subsequently appeared that there were other expenses, and the court held, that the receipt having been given by mistake, the plaintiff was entitled to recover the other expenses not embraced in the receipt.

Mr. Story (§ 151) remarks, that the general ground upon
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which all the distinctions proceed in cases of mistake is, that mistake of facts in parties is a proper subject of relief only when it constitutes a material ingredient in the contract of the parties, and disappoints their intention by a mutual error.

In this case it is clear that the matter in connection with which the mistake occurred, the alterations, constituted a material ingredient in the settlement made, and the intention of the parties was disappointed by a mutual mistake.

A plaintiff, alleging a mistake in a settlement or contract, made in conformity to an antecedent agreement, where the evidence of the antecedent agreement is not in writing, will find it difficult to prove the mistake where the answer is responsive and in denial. For this reason, relief under such circumstances is seldom obtained. There is less difficulty in reforming written instruments where the mistake is plainly made out by other preliminary written instruments or memorandums of agreement, and where it is plainly made out that the parties meant, in their final instrument, to carry into effect the antecedent articles. *Story's Eq.*, 160. The receipt given and the settlement made here was intended to be in strict conformity to the rights of the parties under the original agreement of sale, and the mistake is clearly established.

An examination of the principal authorities relied upon by the appellant, will show that the disposition made of this case is not in conflict with them.

In the case of *O'Keil vs. Whitaker*, 2 Phillips, 338, the premises were sold for the residue of a term of which both parties at the time supposed that eight years only were unexpired, and the price was fixed on that supposition. It afterwards appeared that twenty years were in fact unexpired at the time of the sale. A bill by the vendor to make the purchaser a trustee of the term for the twelve additional years was dismissed. Upon a careful examination of this case, it will be found that the bill was dismissed as much, if

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not more, on account of the character of relief prayed, and the structure of the bill, than upon a general denial of its equity. In dismissing the bill, the chancellor remarked: "It is impossible *upon this bill* to give any relief. The plaintiffs do not ask to rescind the transaction altogether, nor could they, for after ten years' occupation and expectation of the benefit of renewal, it would be impossible to restore the purchaser to his original situation. What they say is, that the contract was improperly executed, and they ask that what remains of the term after expiration of the eight years may be re-assigned. But what is that but to call upon this court to decree specific performance of a contract with a variation. I cannot distinguish such a case from that of a bill to compel specific performance with a variation, for the object of the bill is either to make the purchaser pay more, or to make him a trustee of the rest of the term." This case was disposed of, we thus see, upon the ground that a court of equity would not compel a specific performance with a variation, and the relief could not be granted with justice to the purchaser of the lease-hold interest. It is not seen how the purchaser could be made to pay more, nor how could be made to assume the responsibilities of a trustee.

But this doctrine, that a specific performance of a contract with a variation will not be decreed, does not obtain in the American Courts to the extent it has in the English Courts. Adams' Eq., 384. Mr. Story (Story's Eq., 161) says, in reference to these cases in the English Courts, that it is extremely difficult to perceive the principle upon which such decisions can be supported consistently with the acknowledged exercise of jurisdiction in the court to reform written contracts, and to decree relief thereon; and Chancellor Kent has not hesitated to reform an agreement by parol evidence and to decree a performance, as thus varied from the written agreement. 2 Johns. Chy., 585. But, however this may be, it cannot affect this case. The effect

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of the decree in this case is not to decree a specific performance with a variation. It sets aside a receipt in full, founded in mistake. It opens the settlement, and in effect decrees specific performance of an antecedent agreement according to its strict terms, which agreement the parties intended to perform by the settlement, but by mistake failed to do so.

In the case of *Burt vs. Barlow*, 3 Brown Chy. Cas., 452, bond given for a certain sum, which was calculated to be the amount of a residue of personal estate, it turns out the sum is miscalculated. The bill to have the bond considered as a security only for the real sum dismissed. The Lord Chancellor, in disposing of this case, remarks: "You have no *distinct evidence of the mistake*; had the party acted upon the idea of a general speculation, and you had offered to show what the intention of the party was, perhaps such a bond as this might have been rectified." To understand this language, it must be construed with reference to the facts of the case. The parties, before the bond was given, being equally advised of the situation of the estate, and of their rights, made a calculation and estimate of its value, and having computed the part of the real estate coming to the obligee, the bond was executed for what was computed to be the fourth part of the personal debt. It turned out afterwards that the proportionate part of the real estate coming was not so much as it was computed. The evidence of mistake was, that the obligor in the bond had received only two hundred and eighty-five pounds, while the bond was for six hundred pounds. The Lord Chancellor remarked that this was no distinct evidence of mistake. This was a case of compromise; at the time neither party knew what the personal estate would amount to; it was a matter of doubt, and a compromise was made. This is the view Mr. Story takes of this case, (1 Story Eq., 125, note,) and a careful examination shows it to be the correct view. We cannot see that there was any mistake here, unless a pure error in judgment as to value is to be called a mistake. It is ap-

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parent from the language of the chancellor, that he regarded the case as one of compromise, for he intimates that if the party had acted upon the idea of a general speculation, and there had been evidence to show what the intention of the party was, then the bond might have been rectified. It is evident that the intention of the parties in this case was to settle upon their judgment as to values, and risk differences between the value of the real and personal estate. Had it been intended by both parties, that the bond should cover the sum without any risk of considerable loss, and had this purpose and intention been defeated by a mistaken construction of a sentence in a letter before the parties, we would have a case somewhat analogous to one of the aspects in which we have considered this case, such a case, indeed a stronger case, than the one in which the chancellor intimates the party would have been entitled to relief.

In the case of *Ainsley vs. Medleycott*, 9 Vesey, 24, the plaintiff asked no relief upon the ground of mistake. He proceeded upon the ground of an alleged representation made to him by the defendants, to the effect that a certain sum secured under a settlement was money. No such representation being proved, he was denied relief. The difference between this case and that is manifest. The remark there incidentally made by the chancellor, in reference to mistake, was unquestionably correct when viewed in reference to that case. The chancellor remarked, all the parties no doubt conceived the sum secured under the settlement was money, but it was not for him to say that the parties would have made any alteration if they had discovered the true situation of the fund. Their intention was to settle the fund as it stood, but they were all mistaken in the idea that it was money. This, he says, was a situation in which all parties, ignorantly and innocently, fell into mistake. How can I transfer the loss from one to the other without some distinct ground? The difference between the cases is manifest.

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In 4 Johns., 566, the plaintiffs brought a suit at law against two persons as partners, and being unable to obtain satisfaction of their judgment, afterwards discovered that there were others who were dormant partners and asked a court of equity to grant relief against them. In 1 Brown's Ch. Cases, 158, there was a contract to sell an estate for an annuity for life and a certain sum of money. The party died before any payment occurred on the annuity. A specific performance of the agreement was decreed. Gordon vs. Gordon, 3 Swanston, 476, was a case where a family settlement was set aside because one party failed to disclose an important fact within his knowledge which operated to the interest of the relative with whom he was dealing. In 2 Bro., 420, a trustee having purchased at his own sale, realized by subsequent sale a higher price, was held a trustee for the sum produced by the second sale. In 1 Ves., 211, the case is not at all analogous. In 2 Johns. Chy., 274, the case failed for want of proof. The case of Pullen vs. Ready, 2 Atk., 592, was where all the parties knew the facts, and there was a mistake of law. We have examined with care all the cases cited which were within our reach, and they but strengthen our convictions already expressed in reference to this case. Many of the authorities cited by the appellant are cases where contracts are made by parties where there are no rights or obligations or confidences resulting from antecedent agreements, and where the parties meet for the first time to make a contract. As a matter of course, parties, under such circumstances, have a right to take all proper advantage of superior knowledge, and a court of equity will not correct pure errors in judgment as to values resulting from ignorance and like causes.

In reference to the other aspects in which this case has been presented, the authorities do not vary. LaTrobe, at the time of this settlement, knew everything in reference to the matter of additions and alterations, except the precise sum due therefor. He superintended the construction of the house.

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Hayward was entirely ignorant, and it is clear from the proofs and the admissions in the answer, that Hayward did not accede to LaTrobe's construction of the letter until LaTrobe's acts induced the belief that the alterations amounted to but little. From the proofs, it is plain that this was incorrect; that it was a material matter in the settlement, and that Hayward was ignorant, and LaTrobe possessed the information stated. From the circumstances of the case, H. would naturally rely upon any representation by LaTrobe. The rule is, that if a party undertake to make a direct representation as to a fact, even though he be mistaken as to the fact, if the other party is induced to act upon such representation, equity will relieve against the act equally as if it had been a wilful and false assertion, for the injury is the same. 1 Mar. Ch. Decisions, 496; 6 Gill & Johns., 54. The act of LaTrobe here was more than equivalent to such a representation.

Actual fraud is not necessary, in a case of this character, to entitle the party to relief. It is not necessary that it should have been LaTrobe's purpose to get the property, omitting the cost of the alterations and extra work which he had caused to be done, in order to open the settlement.

We do not doubt that LaTrobe did not know the precise cost of the work, and his acts and language at the time of the settlement may have been the result of inadvertence. But this makes no difference. It is against conscience for the defendant, who led plaintiff into error by his acts and language, inducing Hayward, who relied upon them, to conclude that the alterations amounted to but little, and not to the sum which the proofs in the case establish, to insist on the fruits of the receipt in full, and this would be true under the circumstances of this case, even in the absence of the mistake of the parties in the construction of the letter of the agent. 18 Wend., 421.

If the case was reversed—if, in fact, there were no alterations, and Hayward, who had knowledge, (or if he had no

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knowledge,) so acted as to induce the belief on the part of LaTrobe that there were large alterations, and LaTrobe, who was ignorant, made a settlement or accepted Hayward's construction of the letter, and made a payment of one thousand dollars for alterations alone, would a court of equity hesitate to grant relief? We think not.

The effect of the decree in this case is to direct a sale of the premises, and an application of so much of the proceeds as is necessary to pay the plaintiff's debt, permitting the deed of conveyance to stand. This is correct.

The decree is affirmed.

ABNER D. JOHNSTON AND STEPHEN C. DEBRUHL, APPELLANTS, VS. ADAM L. EICHELBERGER, APPELLEE.

A bargains and sells to B one half of a stock of goods not then in his actual possession. B bargains to pay A one-half of the cost of the goods, and one-half of the charges incurred and to be incurred thereon. The cost and charges are to be ascertained at a future time: *Held*, That acts remained to be done between buyer and seller before the sale could be considered complete, and that no present right of property passed. In the same instrument containing the above bargain and sale there was an agreement between the parties to sell the stock of goods as co-partners: *Held*, That it was necessary that a property should pass to the vendee before such partnership could exist *inter se*, and that the vendor had a right to insist upon payment for the goods before the vendee acquired an interest as partner: *Held further*, That acts which may be attributed to common courtesy and to the confidence which generally exists between persons who have agreed to enter into the intimate confidential relation of partners, should not be held to be a waiver of those conditions necessary to be performed before that relation is to exist under the contract.

This is an appeal from a final decree rendered in the Circuit for Marion county. Adam L. Eichelberger filed his bill

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in that court setting up a co-partnership between himself and Abner D. Johnston, in the business of selling certain goods and merchandise, which Johnston had before that time purchased in the city of New York. At the date of the alleged agreement, which was in writing, the goods had not arrived at the point where the business was to be carried on. The defendant, Johnston, in his answer, denied the existence of any co-partnership in the goods, insisting that under the terms of the agreement payment for one-half of the goods was a condition precedent to the acquisition of an interest by Eichelberger. After replication there was a reference to a master, a statement of an account, and a final decree for a balance found to be due by Johnston to Eichelberger. From this decree, an appeal was prosecuted to this Court. The principal ground upon which a reversal of this decree is sought, is, that at no time did a co-partnership in the stock of goods exist. This is all of the case made by the pleadings which is examined by this Court. The allegations of the pleadings, and the evidence having a bearing upon this point, is fully stated in the opinion of the court.

S. M. G. Gary, with whom was *A. J. Peeler*, for appellants.

Johnston and Eichelberger were never partners *inter se*. Payment for one-half of the stock was a condition precedent to the existence of that relation, and there was no payment.

Looking to the agreement, we find that Johnston had bought a stock of goods in New York, which were to be shipped to Ocala. That Johnston sells to Eichelberger one-half of said stock in consideration of certain covenants. Eichelberger agrees to pay one-half the original cost price, together with one-half the cost and charges that may or shall be expended in transporting said goods to Ocala. The parties agree to sell said goods in Ocala as equal co-partners, &c. To divide profits and bear losses equally.

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The first point to be noticed is, that this was an agreement, not for a general partnership to carry on the business of merchants, but a limited partnership for a particular business, to-wit: the sale of a particular stock of goods in the town of Ocala; a partnership without limit as to duration, and dissolvable at pleasure.

The second point to be noticed is, that the agreement was an entirety; that the sale and the partnership were inseparable. Johnston was not selling Eichelberger a half-interest in the stock which was to be severed or taken away from the rest of the stock; Eichelberger's interest was to be *per my et per tout*. The purpose of the agreement was to enable Johnston to realize on half the stock of goods, and at the same time secure a partner; the sale creating the partnership and the partnership being the inducement to the sale.

The third point to be noticed is, that though the language employed in the agreement seems to impute a partnership *in praesenti*, yet, that looking to the whole agreement, the partnership was to commence *in futuro*.

The goods at the time were in New York, and were to be shipped to Ocala; the partnership business could not actually begin until the arrival of the goods; the joint ownership and community of interest could not attach until their arrival. The payment of the money for half the stock, &c., by Eichelberger and his admission to the rights of a partner were to be concurrent.

The fourth point to be noticed is, that Eichelberger could not, under the agreement, claim the rights of a partner until he had complied, or offered to comply, with the covenant on his part of payment. Nothing but a payment, unless this had been waived, would have made him a partner. Even an offer to pay, and a refusal to accept on the part of Johnston, would have simply placed Eichelberger in an attitude to sue at law for a breach of the covenant, or to file his bill in equity for a specific performance; and a bill for specific performance would have been unavailing in this case, be-

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cause to entitle a party to this remedy the partnership should be for some definite term. Fry on Spec. Per., 504. With reference to the word "pay" in this agreement, we hold that the parties in its use meant Eichelberger should pay to Johnston in money, or by Johnston's consent, something equivalent thereto, for half the stock of goods, &c., and that the word "pay," in its technical signification, precludes the idea of a cross demand or set off. 19 Ark., 230; 3 Sandf. Ch. Rep., 305. The fact that the parties did not show by their agreement that payment was to be made in something other than money, is evidence that money was intended. "*Expressio unius exclusio alterius.*"

No time being fixed in the agreement, the presumption is that the payment was to be made by Eichelberger concurrently with being admitted as a partner. It is not pretended by Eichelberger that he paid to Johnston the amount of one-half the price of the goods, or that he contributed anything to the purchase of said stock of goods.

It only remains now to inquire upon this point whether the covenants on the part of Eichelberger, which we have seen were not performed, were waived by the parties. We insist that the acts and declarations of Johnston, disclosed by the evidence, do not establish a waiver of the original agreement to pay, and the substitution of a new agreement to extend credit. The answer expressly affirms that defendant always insisted upon payment, and the bill itself admits it. We think there can be no doubt here. In support of our position that the acts proved do not constitute a waiver, we cite Bird vs. Hamilton, Walker's Chy., 361.

L'Engle & McConnell for Appellee.

The answer of the appellant, Johnston, admits that a written agreement of sale and partnership was made between himself and respondent, but claims that it was conditional, and this claim is attempted to be sustained by parol testimony.

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The agreement itself is before the court, and is plain and clear in its terms. It cannot be contradicted or varied by parol testimony. 1 Greenl. Ev., 275, 280; 2 Parsons on Con., 548, 549, 550.

The testimony of the witnesses, both for appellant and respondent, shows that this written agreement was carried into effect; that the goods, on their arrival, were received, opened, marked and stored by Eichelberger, to whom Johnston had delivered the invoices; that the clerks were employed by Eichelberger; that the goods were sold under his direction, and that, during Johnston's absence, Eichelberger had entire control over the store, and after Johnston returned had equal control with Johnston; that this state of things continued for several months, until disputes arose about other business in which they were jointly engaged.

There was such a delivery as the nature of the transaction and the character and situation of the goods required or permitted, and this, with the subsequent acknowledgment and recognition of the delivery, rendered it complete. 2 Story on Con., 803, 810, 823, 824; Story on Sales, 311; 2 Parsons on Con., 323, 324; Hilliard on Sales, 88, note 89. It is contended by the appellant that the sale by Johnston to Eichelberger of a half interest in the stock of goods was upon a condition precedent, to be performed before the title should pass, viz: that cash should be paid. Even if this were true, the condition was waived by the act of putting Eichelberger in possession or control of the goods. No time was fixed for payment, and therefore the title passed as soon as possession was given. 2 Story on Con., 32, *et seq.*, and 83; 1 Parsons on Con., 435, 436, 440, 443.

The testimony and the master's report show that at the time that this contract of sale was made, Johnston was indebted to Eichelberger in a large sum of money, sufficient to pay the purchase money of the half interest in the goods. This indebtedness was intended to be set off against this purchase money. The weight of evidence shows that such

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was the understanding between the parties. But whether that was the understanding, is inimportant. Even though the terms were cash, an indebtedness of the vendor to the vendee may be set off against a demand for the purchase money. Hilliard on sales, 175, sec. 10; 1 East, 375; 16 East, 130; 1 Bingham, 311; 2 Parsons on Con., 249; Babington on Set-off, 4 Law Lib., 13, 14, citing Comforth vs. Rivell, 2 Maul. & Sel., 510. The appellants admit the contract of partnership, but claim that it was to begin *in futuro* on the performance of certain conditions. The testimony shows that the partnership commenced at once, and that Eichelberger acted and was recognized by Johnston as an equal partner. But the instrument of partnership is itself sufficient without any testimony. By this instrument, no time is fixed for the partnership to begin, and therefore it commenced from the date of the execution of the partnership articles. Story on Part., 194. Even if no written partnership agreement existed, the acts of the parties were sufficient to constitute a partnership. Johnston, as the evidence shows, admitted the partnership. When in company with Eichelberger, he talked with him about the store in controversy as "our store." He permitted Eichelberger to control the store entirely in his absence, and equally with him in his presence. This state of things continued for months, and after disputes arose about other matters, he consented that the goods and assets should be equally divided and the partnership dissolved; and not till after the division was made, and after he had seized and concealed the articles of partnership, did he deny the partnership and refuse to permit Eichelberger to have his share of the goods.

His acts established the fact that the partnership did exist as charged in the bill of complaint. Story on Part., 86; Gow on Part., 4.

The respondent, by crediting Johnston's indebtedness to him with the price of the half interest in the goods, contributed an equal amount of capital to the business. It was

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not necessary that money should be paid in cash; the indebtedness of Johnston to Eichelberger was equivalent to money, and was sufficient. Story on Part., 192; Gow on Part., 10, and notes.

The evidence sustains the allegations of sale and partnership, as alleged in the bill of complaint.

The within contract of sale and partnership shows the terms of partnership.

WESTCOTT, J., delivered the opinion of the Court.

The principal question in this case is, whether, as between the parties Johnston and Eichelberger, a partnership existed at the time of the institution of this suit in the goods, which is the subject matter of the controversy. If it did not exist, then the primary and essential equity in the case is wanting, and it must fail.

Eichelberger insists, first, that such partnership existed by virtue of an instrument of writing executed on the 2d of March, A. D. 1867.

In the second place, he contends that if under the written instrument a partnership did not then exist, it existed by virtue of the terms of this instrument, coupled with the acts of the parties, which transpired between the date of its execution and the institution of this suit.

To determine the first question, we have only to construe the written instrument executed by the parties. To determine the second question, involves a consideration of all the acts of the parties, including the instrument. The instrument is as follows:

STATE OF FLORIDA, }
MARION COUNTY. }

THIS INDENTURE, Made this second day of March, in the year of our Lord one thousand eight hundred and sixty-seven, between Abner D. Johnston and Adam L. Eichelberger:

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WHEREAS, The said Abner D. Johnston has purchased a certain stock of goods, wares and merchandise in the city of New York, consisting of———, which said stock of goods, wares and merchandise are to be shipped and transported to the town of Ocala, in the county and State aforesaid;

Now this indenture witnesseth, That the said Abner D. Johnston, for and in consideration of the covenants and agreements hereinafter entered into by the said Adam L. Eichelberger, hath bargained and sold, and doth by these presents bargain and sell unto the said Adam L. Eichelberger, one-half of the aforesaid stock of goods, wares and merchandise.

And the said Adam L. Eichelberger, for and in consideration of all the above, hath bargained, covenanted and agreed, and by these presents doth bargain, covenant and agree, to pay to the said Abner D. Johnson one-half of the original cost price of the said stock of goods, wares and merchandise, together with one-half the costs and charges that may or shall be expended in transporting the aforesaid stock of goods, wares and merchandise to the aforesaid town of Ocala.

And it is agreed between and by the parties to these presents, that the aforesaid Abner D. Johnston and Adam L. Eichelberger will sell the said stock of goods, wares and merchandise in the said town of Ocala as equal copartners; and also, that they shall and will bear, pay and discharge equally between them all rents and other expenses that may be required or incurred in the said stock of goods, wares and merchandise, and that all gains, profits and increase that shall come, grow or arise from or by means of the sale of said stock of goods, wares and merchandise shall be divided between them equally, and that all loss that shall happen through or by means of the selling of said stock of goods, wares and merchandise shall be borne and paid between them equally.

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IN WITNESS WHEREOF, The said parties have hereto set their hands and seals, the day and year above written.

A. D. JOHNSTON, [L. s.]

A. L. EICHELBERGER. [L. s.]

Signed and sealed in the presence of

STEPHEN C. DEBRUHL,

W. J. McEDDY.

This instrument, when executed, was left in the possession of a third party, the defendant, DeBruhl, and the answer of Johnston, which is responsive to the bill in this particular, alleges that it was left in the possession of this third party upon the distinct understanding between complainant and himself that it was to be in his (defendant's) control until complainant complied with his agreement to pay for the goods.

Whatever inference may have arisen from a delivery of this instrument, therefore, to the vendee, Eichelberger, cannot arise in this case.

The contract, so far as it relates to an acquisition of an interest in the goods by Eichelberger, is contained in that portion of the instrument which precedes the *mutual covenant* that the parties will sell the goods in copartnership.

Eichelberger could not be a partner unless he acquired an interest. This was certainly a condition precedent. If he did acquire an interest, its acquisition must have been under this part of the agreement.

Johnston bargains and sells one-half of the goods. That constitutes the contract upon his part. Nothing is said as to the price, or a method of ascertaining the price, or as to the mode or time of payment. The price is an essential element of a sale. In cases arising under the statute of frauds, it has been repeatedly held that the price enters into the legal contemplation of a bargain, and that a note or memorandum, which does not furnish evidence of the price agreed upon, is not sufficient to take a contract of sale out of the statute. 5 B. & C., 583; 2 Kent's Com., 477; 15

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Vt., 685; Hill on Sales, 230. So also is payment made or to be made an essential element to a sale. If no payment is made and none to be made, it is a mere gratuity. 3 Gray, 113. To determine, therefore, other essential elements of the contract, we must look to the remainder of this instrument. All of it should be construed together, and the intention of the parties derived from a consideration of the whole, and a consistent construction given to each part if possible.

Upon examination, we find that it consists of a "*bargain*" and agreement by the vendee to pay to the vendor one-half of the original cost of the goods, together with one-half of the charges expended and to be expended in transporting them to Ocala. The instrument, therefore, amounts to this: J. bargains and sells to E. one-half of a quantity of goods not then in his actual possession. E. bargains to pay one-half cost price and charges. The charges are not yet incurred, the cost not yet ascertained, the goods not yet arrived, so that these matters can be done by buyer and seller. The contract as to payment was simply to pay without specifying time. There was no express agreement to extend a credit. The general rule in reference to payment is, that when no time is fixed for payment, the sale is for cash. In this case, as the price was to be ascertained at a future date, the payment must be postponed to that time. There is nothing in the contract which can extend it beyond that time, and it is extended to that time *only because the price was to be then ascertained*. In this case, on account of the character of the interest which the vendee was to acquire, the interest of a partner, there was to be no actual separation of the goods or actual delivery of the one-half.

In the sale of personal property, where anything remains to be done before the sale can be considered as complete, whether to be done by the vendor or vendee, as between the parties themselves, the right of property does not pass.

As between buyer and seller, there remained to be done in

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this case certain acts which were necessary to ascertain the price and which fixed the amount to be paid, and for this reason the time of payment, where the sale is of an undivided half, as in this case, the acts stated above are about everything that could, under any circumstances, remain to be done, as no separation or actual delivery is required.

If the interest to be acquired by the vendee had been such as admitted an actual delivery, and had the goods been actually present, payment and delivery under such a contract must have been simultaneous acts. 6 Cowen, 110. Because there was to be no actual delivery in this case, it does not follow that the property would pass without payment. The result is, that the vendee must have paid at the proper time, before a property would pass.

No credit was agreed on here. Payment was a condition precedent to the passing of the property. There could be no payment until the price was ascertained—no price could be ascertained until charges were incurred and the goods arrived. These things had to happen to be ascertained as indispensable requisites to payment. It was urged in argument, and it is true, that a covenant is a good consideration for a sale; but if the covenant itself is to pay generally, specifying no time, it cannot be inferred from this that any credit was to be extended. The rule is, that where no credit is agreed on, or is necessarily implied, the property does not pass without payment or actual delivery, which is generally a waiver. Looking at the entire instrument our conclusion is, that the contract was executory; that there was no completed sale, and that no present right of property passed to Eichelberger. The following cases sustain the correctness of this view. Some of them go much further than this case; 6 East, 614; 1 American Law Rev., 425; 1 Sand., 297; 7 Wend., 406; 15 Johns., 351; 3 Wend., 112; 3 Cowen, 84; 6 Cow., 101; 13 Mass., 88; 25 Penn., 208; 4 Seld., 291; 10 Hump., 337; 21 Vt., 147; 12 Pick., 83; Amer. Law Reg., May, 1869, 319; 1 Camp., 427. While the facts are not

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similar and the cases widely different, yet the general views expressed by this court in the case of Stafford vs. Anders, 8 Fla., 40, go much further in the requisites laid down to make a sale complete than we do in this case. It appears from the evidence that there were unadjusted accounts between the parties at the time this instrument was executed. It is insisted that Johnston was indebted to Eichelberger in a sum equal to the cost and charges of one-half of the goods, and Eichelberger insists that the existence of this debt was a virtual and legal payment according to the terms of the contract. As this matter is several times mentioned in the testimony, it is proper, while considering the effect of this instrument in other respects, to determine it in this respect.

Mr. Hilliard, in his treatise upon sales, remarks: "With regard to the payment of goods purchased in conformity to the general rule, which requires such payment to perfect a sale, a vendor is not bound, without special agreement, to receive anything for the price *except cash*."

The case of Lorin vs. Smith, 1 Denio, 573, was a sale of merchandise for cash, to be paid for on delivery. The vendee tendered the overdue note of the vendor. It was held insufficient.

Had the property in the goods passed under this agreement, then in an action for the price, E. might have set off J.'s indebtedness, although his (E.'s) contract was to pay ready money. That is the case cited by appellees, and is not this case.

It only remains to consider the subsequent acts of the parties, coupled with this instrument.

Did a partnership exist by virtue of the two combined? The evidence upon the subject may be divided into two parts: First. The acts and declarations of the parties before Johnston left for New York. Second. Acts and declarations of the parties after his return and before the commencement of the suit.

It appears that Johnston left Ocala for New York in a

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few days after the execution of this instrument, and before the arrival of the goods. Hearing before his departure that the goods were about to reach Ocala, he made arrangements to have them marked by clerks employed by Eichelberger in his own store in the same town. As to this matter, which is all that happened before Johnston left, the testimony is substantially as follows:

W. P. Trantham, an employee of Eichelberger, testifies that a short time after Johnston returned from the North, he and Eichelberger came to me; Johnston gave me the invoices of all the goods, and said that he wanted me and Mr. Roof to mark the goods when they arrived; he also said that he wanted me to compare the prices with the prices of goods Eichelberger had purchased about a year before; Mr. Roof and I were then employed exclusively by Eichelberger; the goods, when they arrived, were opened, marked and left by us in charge of the clerks in A. D. Johnston's store.

Wm. H. Anderson testifies, that the goods were opened and marked by Mr. Eichelberger's clerks, assisted by himself and Mr. Miller; Johnston was absent during this time, and Eichelberger gave instructions and exercised general control. Eichelberger, who was examined, says nothing in reference to what happened between Johnston and himself before Johnston left.

Johnston testifies, in reference to this matter, that before he left he received notice that the goods would arrive soon; that he employed D. A. Miller as clerk, and authorized Eichelberger to hire Anderson, and requested Eichelberger when the goods came to hand to have them opened and let the clerks commence selling; that he did not know when he would return, and he did not wish the goods to remain boxed up; that he authorized Eichelberger, as his agent, to receive, open and mark the goods on their arrival; that he would have entrusted him to do this if he had not been his agent, as he had the clerks to do so; that he did not do this

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on the faith of the agreement. Upon the cross-examination, he states that he never told Eichelberger in express language that he was to act as his agent; that he agreed to pay him no compensation for the service; he simply told him what to do. He says that he *always refused* to acknowledge any *interest in Eichelberger* until he (Johnston) was paid.

Eichelberger states, in his bill, that Johnston was indebted to him the time of the execution of the articles of agreement, and alleges that he "has always been ready and willing and *repeatedly offered* to set off this amount against his indebtedness to Johnston," which said *Johnston refused to accept*, "but demands that your orator make his payments in cash," while he himself refuses to pay any of his indebtedness to your orator, by reason of all of which your orator has always deemed himself excused from any further or other compliance with his said stipulation, and has deemed the said payment made, virtually and legally, by the existence of the said debt.

This is substantially what occurred, according to the allegations of the pleadings and the evidence of the witnesses.

Eichelberger's control in Johnston's absence, to have any effect, must be proved to have been done in accordance with authority from Johnston, and the authority, so far as proved, does not establish anything beyond a simple request to have the goods marked and opened. It appears for some reason, that Johnston was desirous that a price should be fixed upon his goods, with reference to the prices charged by Eichelberger for goods sold by him. This was perhaps to avoid any difficulty with E. as to estimates of charges. However this may be, Johnston, neither by his acts nor language, admitted a property of Eichelberger in the goods. He gave the instructions in his own name. He swears that he never intended E. should have an interest until payment, and E. admits that Johnston refused his repeated offers of his own paper in payment for the goods.

This evidence discloses no act which amounted to a waiver

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of his rights of payment, and it does not establish a partnership. What was done, even according to the witnesses of complainant, was nothing more than simply giving an authority, in Eichelberger's presence, to Eichelberger's employees, in his individual store, to open and mark the goods upon their arrival, which act was performed by these employees, assisted by others in the employment of Johnston. When the goods were marked, they were left in A. D. Johnston's store.

After the latter part of May, it is admitted that Johnston took exclusive control of the goods, denying all interest in Eichelberger. Johnston returned from New York about the first of April. We proceeded to examine the evidence covering this period, and to state its results as to the rights of the parties.

W. P. Trantham, an employee of Eichelberger's, and who was not connected with the store in which these goods were, says, in his direct examination, that during this time a mercantile business was carried on with these goods; that it was *his understanding* that the business was carried on by Johnston & Eichelberger. The subsequent portion of his direct examination relates to a division of the goods in the latter part of May, which we will consider subsequently in connection with all the testimony relating to that matter. Upon the cross-examination, the witness states that he was in the exclusive employment of Eichelberger, in E.'s individual store; that his understanding that the business was carried on by Johnston & Eichelberger was derived from Eichelberger, who told him so; that he was never told so by Johnston positively, but has heard Johnston speak of the mercantile business as our business, in speaking with Eichelberger at different and several times.

D. A. Miller.—This witness, upon his direct examination, testifies that he was a clerk in the store; was employed by Johnston early in March; that Johnston, when he employed him, said that a person named Oxner expected to be em-

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played by him, but that Eichelberger objected; that I would be assisted by a clerk who was highly recommended, and had been employed by Eichelberger, and that he and Eichelberger would sell out that stock of goods and then get a large stock of groceries. (This no doubt all occurred before Johnston left, and even before the goods arrived.) The witness says further, that Eichelberger on one occasion took some flour from the store; that he heard Johnston remark that Eichelberger, instead of letting the goods remain in the store to be sold to defray the planting expenses, was taking them to his own store, charging himself at cost prices, and selling them out at a profit. The witness testifies *that he cannot say that he ever heard Johnston admit any interest of Eichelberger at any other time.*

W. J. McEddy testifies, that he heard Johnston say that he had sold Eichelberger a half interest in his store, *but did not know how about the pay*; heard Eichelberger at one time say to J., let us get money for things for the plantation out of the common store; we then went to the store *known as A. D. Johnston's store*, and I got the money.

W. H. Anderson testifies: Was the book-keeper; store was known as A. D. Johnston's store; was so advertised; was employed as clerk by Eichelberger; while Johnston was away, received instructions from Eichelberger until Johnston returned; on his return, he assumed control of the store; although present in the store, he cannot say that Eichelberger at any time after Johnston returned gave any directions as to the management of the store or the sale of goods, or exercised in any manner any control or authority in the store; he came and purchased goods, and they were charged to him; the clerks in the store carried it on as Capt. Johnston's store; he had the principal management and control of it after Capt. Johnston returned; Eichelberger controlled the store until Johnston returned from the North; afterwards Johnston was at the store almost every day, and we regarded him as the manager; Mr. Eichelberger gave

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instructions, I recollect, in one instance, which Capt. Johnston countermanded; we regarded Mr. Eichelberger as interested in some way.

Eichelberger, although examined as a witness, was not interrogated in reference to the particular matter of admissions as to partnership relations. His idea was, that he was entitled to an equal interest in the goods, because Johnston was indebted to him in an amount equal to the sum he was to pay.

Johnston testifies that he does not recollect all the conversations he may have had upon the subject, but that he never intended that Eichelberger should have any interest until he paid for the goods, and that he repeatedly told him so. This agrees with Eichelberger's admissions in the bill. Johnston says: "I refused all the time to let him have the goods until he paid for them, both before I went and after I returned."

Jas. H. Johnston's testimony relates almost exclusively to matters occurring in view of agreements made looking to an arbitration. His testimony, so far as it relates to the matter of partnership, is that the store was known by common reports as the store of Johnston & Eichelberger; that a book in which accounts were kept was marked A. D. Johnston & Co., and that during his presence in the store for a few days in the latter part of May, when the parties had agreed to divide the goods, and to an arbitration of all matters of difference, they both appeared to exercise equal control over the goods. They spoke of the stock or store as our stock and our store.

What does this testimony amount to? Leaving out Trantham's understanding, derived from what Eichelberger told him, his testimony amounts to no more than that he heard Johnston, in conversing with Eichelberger at different and several times, speak of the business as our business.

The other witness, Miller, says that Johnston, when he employed him, which was no doubt before he went

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North, and after the execution of the agreement, seemed desirous of employing persons acceptable to Eichelberger. He says that beyond Johnston's objection to Eichelberger's taking goods and selling them in his own store at a profit, he could not say that he ever heard Johnston admit any interest of Eichelberger. McEddy says that Johnston said he had sold an interest to Eichelberger, but did not know how about the pay; that he heard Eichelberger mention the store once, in Johnston's presence, as the common store.

Anderson, who was the book-keeper, says that the store was advertised as the store of A. D. Johnston, and was so known by the clerks, but that they believed that Eichelberger had some interest; that Johnston, on his return from New York, assumed control of the store; that although the witness was present in the store most of the time, he cannot say that Eichelberger gave any general directions or exercised any control after Johnston returned; that he recollects one instance only in which Eichelberger gave instructions, and that Johnston countermanded them; that he has heard Johnston say that Eichelberger had not come up to the agreement, and he was therefore unwilling to allow him an interest in the goods.

Eichelberger says nothing upon the subject when examined as witness, while in his bill he admits that Johnston demanded cash for his goods; and Johnston states expressly that while he did not recollect all the conversations he had with Eichelberger, he did refuse at all times to allow him an interest until he paid for it.

Jas. H. Johnston testifies that the parties spoke of the store as our store, and that a book in which accounts were kept was marked Abner D. Johnston & Co.

What appears here is not sufficient to prove a waiver by Johnston of his right to payment for the goods, or an acknowledgement that he consented to Eichelberger's having the interest of a copartner without payment according to the agreement. Calling the store our store, our business, &c.,

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opening the books in the name of the contemplated firm, expressions of intention upon the part of the parties to sell out that stock and buy another, are expressions and acts which each of the parties might indulge in without a waiver of antecedent rights. Especially is this true when the partner in possession, Johnston, exercises general control, and shows a claim of exclusive general control by countermanding the orders and directions of the contemplated partner. They are expressions made in view of a compliance with the agreement, and in the belief that everything would be done that should be. It shall not be held, under such circumstances, that Johnston should have directed his intended partner to remain out of the store, and it was perfectly natural that they should have spoken of the business in the manner that they did. Expecting and insisting upon payment, Johnston may have permitted the whole community to infer that such a relation existed by his silence, or by acts of common courtesy extended to his contemplated partner, relying upon a compliance by him with his contract; and yet, if he failed to perform his covenants, these acts, done upon the understanding of payment and fair dealing upon his part, could not and should not operate to excuse him from payment. Acts which may be attributed to common courtesy and to the confidence which generally exists between persons who have agreed to enter into the intimate confidential relation of partners, should not be held to be a waiver of conditions necessary to be performed before that relation is to exist under their contract.

These views and conclusions are fully sustained by the adjudications of the courts in like cases.

We find this case in 1 Freeman's Chy., 357: A agreed to give his notes for a certain sum to B for half of B's stock in trade, the two to be partners thereafter. B, believing that A could execute the notes at any time, suffered him to act as a partner, and to buy and sell goods in the partnership name. A failed to execute the notes for his share of the

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stock, and advanced money to the concern. Held, that the delivery of the notes was a condition precedent, and that no partnership existed until A complied with it; that a court of equity would lend B its aid to recover the goods; that A would have no right to an account and division of the profits since their connection, and that the fact that the parties held themselves out to the world as partners, was not a waiver of the original understanding; that a waiver does not take place unless there is clear evidence of an abandonment of the original terms or the substitution of new ones.

Even if it was admitted that the parties, Johnston and Eichelberger, held themselves out to the world as copartners, which is not the fact, yet Johnston's always demanding payment before he would admit Eichelberger's interest, and E.'s noncompliance with his part of the bargain and agreement, would prevent the existence of the relation of copartners *inter se*. The case of Bird vs. Hamilton, 1 Walker's Chy., 361. In this case the books were kept for thirty days in the name of the contemplated firm. The language of the articles was, that the parties "agreed to enter hereby into partnership." The articles, however, provided that Bird was to furnish one-third of the capital stock. This he neglected to do. The court held that where the question of partnership arises, not with third persons, but between the parties themselves, the agreement out of which the supposed partnership arises is to be construed as any other instrument between the parties; that is, that their intention should control, and that while in this case the letter of the agreement imported a partnership *in presenti*, yet it was apparent from the whole instrument that the contribution of one-third of the capital stock by Bird was a condition precedent to the existence of a partnership *inter se*. The court held further, that the fact that the business was carried on for the period of thirty days in the name of the proposed firm, was no waiver, and that the party in default was not entitled to the rights of a part-

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ner. The chancellor, in this last case, speaking of the act of carrying the business on in the name of the firm for a short period, says: "It should not be construed into a waiver of the agreement requiring Bird to furnish a third of the capital. To give such a construction to what was intended as a favor to Bird, and nothing more, would be hard indeed. It would be saying to persons hereafter in like circumstances, show no indulgence whatever to a defaulting party, or it will be construed into a waiver of your rights."

In the latter part of May, it appears that the parties agreed to submit all their business matters to arbitration for settlement, and it is claimed that what transpired on that occasion is material in this connection.

Everything which occurred at this time which may be considered as admissions of the relation of partnership, has been considered. The matter of arbitration, with all agreements entered into with strict reference to it, became inoperative by revocation of the authority given by Johnston, and it is not perceived how this matter is material. The parties did not seek to form a partnership at this time, but to settle all mutual accounts. We will, however, examine the testimony, and state our views in reference to it.

Jas. H. Johnston testifies: I was instructed to take an account and make an equal division of stock, one part to be set aside for A. D. Johnston, the other for A. L. Eichelberger; this division was made in the latter part of May; I received these instructions from A. D. Johnston, A. L. Eichelberger being with him; with the assistance of the clerks I took the stock, and after several days' labor, divided the goods; I set apart one-half for Johnston and the other for Eichelberger, each so marked as to distinguish them; each of the parties took goods from their respective parts, and spoke of the shares as their shares; having divided the goods according to instructions, I left them in the store in charge of the clerks.

S. D. McConnell testifies: Was called on by Eichelber-

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ger to act as an arbitrator in adjusting some accounts between him and Johnston; both were present and took part in giving the instructions; we were told that it was desired that we should adjust all accounts then existing between the parties, including the store in Ocala and the accounts in the farming copartnership; the manner of dividing the goods was discussed in my presence; they agreed to call in James Johnston to take an inventory and divide them equally; Johnston said he could dispose of his part to better advantage; nothing was said when we received the instructions as to E.'s paying cash for the goods; I heard Johnston say, during the progress of the arbitration, that it was not right that Eichelberger should get *his goods* at cost, while Eichelberger was charging him full retail prices. The witness gives his opinion as to the matters done and the acts of the parties in his presence. He says: From what was said in my presence by both parties, I was satisfied at the time that the amount that was due to Eichelberger from Johnston on store account, when ascertained, was to be allowed.

W. P. Trantham testifies to the fact of division, and that he received goods from the store, at Eichelberger's request, from a pile which one of the clerks pointed out as belonging to Eichelberger. Miller testifies that he was instructed by Johnston to divide the goods in two piles, one for himself and the other for Eichelberger; that Johnston said that he and Eichelberger could not get along together; that he was afraid E. would swindle him; that he would rather have five dollars than a thousand with some one else. The goods were divided and remained so several days, when Johnston instructed me to put them together again, and I did so; I delivered some of the goods after they were divided to Eichelberger; Johnston gave as his reason for putting the goods together again, that he had sold E. a half interest, but that he could not "ante up," and that he would not allow him an interest in the goods until he did.

Anderson testifies that he knew of the division, and that

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he heard Johnston say that E. had not come up to the agreement, and that he would not allow him an interest in the goods.

Eichelberger, in his amended bill, alleges that at the time of the sale and thereafter, Johnston was indebted to him in a sum equal to the amount due for the goods, and that he has always been ready and willing to set off this amount against his indebtedness to Johnston, "which said Johnston refuses to accept, but demands that he pay in cash, while he refuses to pay any of his indebtedness to your orator; by reason of all of which, your orator has deemed himself, as he still does, discharged and excused from any further or other compliance with his said stipulation to pay his proportion of the amount of said goods and expenses to said Johnston, and has deemed this said payment as made virtually and legally, by virtue of the existence of the said unpaid debt." As a matter of course, these admissions in the bill of the plaintiff are evidence of the best character.

In his testimony, Eichelberger says that Johnston and himself agreed to submit all of our matters of account to arbitration, and we agreed there, in the presence of the arbitrators, that any balance that was due to me was to be credited to me as a payment for the share which I had purchased in the stock of goods. According to this, Johnston had never agreed, up to this time, to a payment in his own paper, and it negatives the view that Johnston supposed or consented to Eichelberger's having such an interest without payment. But from the answer, as well as from the bill and the evidence, we derive no confirmation of this statement of Eichelberger, as we shall presently show.

Johnston testifies that he authorized Jas. Johnston, Anderson and Miller to divide the goods in his store; that his reason for so doing was to let Eichelberger have one-half of the goods, provided he paid for them; that while he does not recollect all the conversations he may have had on the subject, he never has recognized any interest of Eichelberger

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in the goods, nor did he ever intend him to have any interest until he paid in money; that he did not and does not now know the state of the accounts between them, and that the division was authorized upon our understanding that the goods were to be paid for in cash; that there was no understanding that if a balance was in favor of Eichelberger, it was to be allowed him in payment of the goods. After the division I put the goods together, because he refused to pay cash, and wanted to have balance on old accounts allowed. We proceed to examine this testimony.

James H. Johnston's permitting Eichelberger to take a part of the goods without payment, when his authority did not extend to a delivery, but only to a division, is not a waiver by Johnston of his right of payment, nor did these acts pass the property to Eichelberger. The proper inference, even if it is established that Johnston consented to his taking the part, is, that Johnston did this with the belief that Eichelberger would pay for the whole when all of the part which Johnston intended to let him have was delivered. Johnston testifies that as soon as he found that Eichelberger was not going to pay, he instructed the clerks to put the goods together, and the clerks say that this was about his language at the time. Lord Ellenborough, in a similar case, held that the vendor, by such an act as a delivery of a part, did not change his rights or his property in the remainder. 1 Camp., 427.

Submitting all accounts to arbitration, agreeing to an inventory and division of the goods in the store, expressing nothing as to Eichelberger's paying in cash, and saying expressly that it was not right that Eichelberger should get *his* (Johnston's) *goods* at cost, which is about what the testimony of McConnell amounts to, does not establish an agreement upon Johnston's part to accept any debt to be ascertained by the arbitrators as a payment, nor do these things constitute a waiver of his rights by Johnston. It is true that this witness, after stating what did occur, gives his opinion of

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the matter, and says: "From what was said in my presence by both parties, I was satisfied at the time that the amount that was due to Eichelberger was to be allowed to E. in settlement for that part of the goods which he was to receive after the division." This is not evidence. The witness no doubt believed, as a matter of law, that under the original agreement a property passed to Eichelberger. He therefore supposed that E. was entitled to the property without payment; that credit was extended, and he would very naturally and properly be satisfied that the amount was to be set off.

The admissions of the bill, which are consistent with the answer and the testimony of Johnston, to the effect that he always demanded cash for one-half of the goods, are certainly sufficient to establish the fact that Johnston never waived his right to payment in cash.

Eichelberger's testimony, to the effect that Johnston and himself agreed, in the presence of the arbitrators, that any balance that was due to him was to be credited as a payment on these goods, is not corroborated by the testimony of the arbitrators in his behalf. It is in conflict with the allegations in his bill, and is denied by the answer and evidence of the defendant. It is, besides, established by the testimony of Miller, as well as the testimony of Anderson, that Johnston directed the goods to be placed together, and gave as his reason for so doing that he would not allow E. an interest until he came up to the agreement; that E. could not "ante up" or pay, &c.

In addition to this, it is true that either Johnston or Eichelberger could have withdrawn their consent to the arbitration at any time. 2 Tidd's Prac., 823. Upon the revocation of the authority of the arbitrators in this case, this agreement, even if proved, being made in reference to and in view of the arbitration, could not be effective as a general agreement to accept payment in his own paper. This was the case, also, with all agreements made in strict refer-

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ence to and in consideration of the submission of all accounts to arbitration. Our conclusion is, that there was no partnership *inter se*, and the bill should have been dismissed upon the hearing.

The decree is reversed, and the cause remanded for such proceedings as are conformable to this opinion.

HART, J., delivered the following concurring opinion :

Johnston and Eichelberger were partners in a plantation. Johnston owed Eichelberger. Eichelberger had a bar-room business also. Johnston determined to get a stock of merchandise for sale; rented a house from Eichelberger for that purpose; went to New York, purchased the goods, returned to Ocala, and, before the goods were shipped, made the said contract of sale of half of them, and of partnership, the written contract being left with the attorney who wrote it; and Johnston went away again.

The goods were brought to Ocala in Johnston's absence, and were opened and marked by Eichelberger and his clerk, acting with Johnston's clerk. Johnston returned, and the business of selling the goods was conducted by both Johnston and Eichelberger; the latter alleging now that he was a partner under and by virtue of the said written contract of sale and partnership, and Johnston alleging now that although he humored Eichelberger along, in hopes that he would perform his contract by paying for half the goods, and thus become a partner, yet he never considered him as such; and that, in fact, as between the two, he never was such; and that he (Johnston) even consented, after awhile, to divide the goods with him, still hoping that he would pay cash for said half; but that, finding at last that he would not so pay for them, he broke up the dividing arrangement while it was in progress, denied any partnership, kept the whole stock, and still denies that there was any partnership between them, Eichelberger having had ample time and

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opportunity and not having paid for half the goods, as by his said contract he had undertaken to do.

Eichelberger contends that under the said contract, and by the part he took in opening and selling the goods, he became the owner and had possession of half of them, and was a partner.

If the contract was an executed sale, and established a partnership, Eichelberger had a remedy in chancery as to that partnership, and all the affairs connected with it. If not, the remedies of the parties for their claims against each other lay only in a court of law, and the court of chancery had no jurisdiction. The doubt can be solved only by a correct legal interpretation of the aforesaid written contract.

The Circuit Court construed the contract to be an executed sale, and to have established a partnership, and that tribunal also allowed a set off, which was pleaded in an amended bill, after answer, to prevail, and thus to add to the amount decreed against Johnston. It is from that construction, ruling, and consequent decree against Johnston, that this appeal is taken.

What was the intention of the parties to this agreement, as gathered from the writing itself? It is difficult to construe it, as though the subsequent acts of the parties were unknown. They are known, and leave their impressions upon the mind, in spite of efforts to disregard them. The idea that Johnston intended to have a cash payment from Eichelberger for half of these goods before the partnership was to begin, without regard or reference to any debt then due or owing by him to Eichelberger, and that Eichelberger intended to pay Johnston for said half of the goods, not in money, but with said debt; in other words, that one of the parties meant one thing and the other the reverse of that thing, without either of them using any words in the written instrument expressive of his intention, is found only in their subsequent acts and allegations detailed in the record of the case, which resulted in the decree of the Circuit Court ap-

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pealed from. It may be that this idea would have suggested itself if the instrument of writing could have been and had been submitted in some condition wholly isolated from the subsequent acts and allegations of the parties; but the written instrument, subsequent acts and allegations are all submitted together, and it is, in reality, difficult to separate them in order to ascertain from the written instrument alone what the parties must, under the law of the interpretation of written instruments, be held to have intended by the language used by them. Yet the effort must be made, for the correct decision of the case, one way or the other, may depend upon the result of that mode of inquiry, and no other.

The writing itself states nothing about any other business transactions by or between the parties, or obligations or claims by one to or against the other. It is strictly confined to this particular stock of goods, and to what is to be done with it.

It is contended by the appellant that the word *pay*, in the writing in question, means payment in money, and that from the language used the partnership was to commence only at the time of payment; and by the appellee, that it may be legitimately construed to mean the equivalent of money, to-wit: the said debt due by Johnston to Eichelberger, and that the sale was complete and finished, and the partnership established at the date of the instrument of writing.

The language of the instrument alone shows that it was the intention of Johnston, in consideration of the covenants and agreements of Eichelberger, to sell half of the said stock of goods to him, and establish a partnership with him in the sale of this stock of goods; and of Eichelberger, to purchase and to pay for said half, and to establish said partnership. The main question is, whether Eichelberger was bound "to pay" in money, or whether it was optional with him "to pay" in something else, to-wit: in an unliquidated demand which he claims that Johnston owed him.

The law of the interpretation of written contracts, applicable to this question, is stated by the judges and commen-

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tators as follows: "In the absence of any special agreement, the only payment known to the law is by cash, which the debtor must pay or tender to the creditor when it was due. The tender should properly be in cash, and must be so if that is required; but a tender in good and current bank bills is sufficient, unless it be objected to because they are not money." Parsons on Mercantile Law, 80, 81; 9 Pick., 542; 7 Johns., 476; 2 Fairf., 475; 2 C. J., 16, note; 3 T. R., 554.

"A sale of goods is the exchange thereof for money. More precisely, it is the transfer of the property in goods from a seller to a buyer for a price paid or to be paid in money. It differs from an exchange in law; for that is the transfer of chattels for other chattels, while a sale is the transfer of chattels for that which is the representation of all value." *Ibid*, 41, and notes. Counsel for appellant cite Hill vs. Austin, 19 Ark., 230; Green vs. Storm, 3 Sandf. Ch., 305.

Counsel for appellee contend that even if it were true that the sale depended upon a condition precedent of payment in cash, there was a delivery of the goods, by which the condition was waived, and cite 2 Story on Con., 803, *et seq.*, and 1 Parsons on Con. 435 and 6, 441, 443. It is the written instrument alone that is now under consideration. "Articles of agreement and deeds of conveyance are to be construed by themselves, and not by subsequent acts of particular parties." 3 Barr, 72. The reference to 1 Parsons on Con., is an unfortunate one for appellee. Viewed from the position of the appellant, the law as there announced is strongly in his favor, nor is it seen how the counsel for appellee can construe it otherwise. The written instrument states substantially that Johnston, who had purchased the goods in New York, and which were to be shipped and transported to Ocala in Florida, in consideration of the covenants and agreements entered into by Eichelberger, sold half of them to him; and Eichelberger, in consideration thereof, bargained, covenanted and agreed to pay Johnston half the

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original cost, and half the expense of transportation of the whole stock to Ocala; and both parties agreed to sell the whole stock in Ocala as equal partners, and share equally in the expenses of sale and losses and in the profits, no time nor kind of payment being mentioned. The consideration on both sides is expressed. There was no delivery, could be none, and in fact it was an equal partnership, and not a delivery by one to the other that was intended. Payment was intended to be made, but no receipt of it appears in the instrument by indorsement or separately, and that intention of the parties does not appear to have been performed. It was a very important part of the contract. Without it, the bargain could not be perfected. Without it, Eichelberger could not own the said half of the stock and act as partner, except under some other agreement. Parsons states the law as follows: "All that is essential to the sale of a chattel at common law is the agreement of the parties that the property in the subject matter should pass from the vendor to the vendee for a consideration, given or promised to be given by the vendee. Yet when the parties have not explicitly manifested their meaning, the law makes some important inferences. There is a presumption that every sale is to be consummated at once; that the chattel is to be delivered and the price paid without delay. If, therefore, nothing appears but an offer and an acceptance, and the vendee goes his way without making payment, it is held to be a breach of the contract, (which is presumed to have contemplated payment on the spot,) and the vendor is not bound by the sale." And in a note states, "The law of sales as it stands at this moment, is at least as old as the year books." In 14 H., 8, 17 b, 21 b, in the Common Pleas, the law upon this subject is thus stated by Pollard, J.: "Bargains and sales all depend upon communication and words between the parties; for all bargains can be to take effect instantly, or upon a thing to be done thereafter. They can be upon condition, and they can also be perfect and yet no *quid pro*

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quo immediately. And all this depends upon the communication between you and me; as that I shall have £20 for my horse, and I agree; now, if you do not pay the money immediately this is not a bargain, for my agreement is for the £20, and if you do not pay the money straightway you do not according to my agreement. I ought, however, in this case to wait convenient leisure, to-wit: until you have counted your money. But if you go to your house for the money, am I obliged to wait? No, truly, for I would be in no certainty of my money or of your return, and therefore it is no contract, unless this (delay) be agreed at the communication." In the same case, Brunell, C. J., said, "As has been said, bargains and sales are, as is concluded between the parties, as their intentions can be gathered. For if I sell my horse to you for £10, and we both are agreed, and I accept a penny in earnest, this is a perfect contract; you shall have the horse and I shall have an action for the money. But if I wish to sell my horse to you for £10, and you say that you will give £10 for him, and I say that I am content, still, if you do not pay the money now, but depart from the place, this is no bargain, for I am only content that you shall have my horse for £10, and notwithstanding you say you are content, the transaction is not yet perfect, for you do not pay the money and so do not perform the agreement." And cites *Shep. Touch.*, 224. In these examples no time is mentioned for payment, and it was interpreted to mean immediately. The differences between these and the agreement under consideration are, that in these money is mentioned and the amount is fixed, and in this writing the words *to pay* only are used. The word *pay*, in this writing, is believed to have the same signification as the word *payment*. To *pay*, and to *make payment*, mean the same. Ordinarily, to purchase goods and *pay*, or to *make payment* for them, is to pay in money. If the intention is to pay and to receive pay in something that is not money, but worth as much as, or equivalent to money, it is expected to be specified; other-

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wise, it is necessarily held that money is intended. If something else is received, it is done by some other understanding or consent, presumed to be outside of the original writing or agreement. There must be some "universal representative of all value," to answer to and correspond with the value so strongly implied but not expressed in this instrument. Without the existence of money every such contract would necessarily be only the exchange or barter of one specified commodity for another, or would have no meaning. Sales, technically so-called, originated with the invention of money. Now money is necessarily meant whenever the kind of payment is not specified or clearly provided in the agreement.

In this agreement it may have been intended that "convenient leisure" should be "waited," not only to "count the money," but to ascertain the amount to be paid, provided the invoices of the purchase in New York had not been previously examined, and the expenses of shipment and transportation had not been satisfactorily estimated. This, however, being uncertain, no clue to the true intention as to the time of payment can be obtained from it. It does seem, however, from the language, that the time of the arrival of the goods at Ocala, uncertain as it was, was the time at which it should be held that the payment was intended to be made. Under the law governing the interpretation of such a contrived instrument as this is, the time for the payment was immediately, unless some other inference can be reasonably drawn from the language used. The goods were to be shipped, (no time mentioned,) transferred to Ocala, (no time specified.) The half of the original cost of the whole stock was to be paid, with half the cost and charges that may or shall be expended (by Johnston, of course,) in transporting the stock to Ocala. Now if any time of payment other than immediately can be presumed to have been intended by such expressions, it is the time of the arrival of the goods at Ocala. And the language will bear the construction that such was the intention. There are but two constructions, either that

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Eichelberger, in consideration that the goods had been purchased and were to be shipped and transported to Ocala, agreed to pay for half of them immediately, and half the expenses of transportation to Ocala, or, as it is not seen that he could have received any benefit if they should not be shipped, or should never reach Ocala, that he was to make both payments and the partnership was to commence on their reaching that town. The law would authorize the former; law and equity the latter construction. The time of the goods reaching Ocala was the time when the contract could have a practical beginning, when the parties to it could begin to give it some practical effect. Then it was that the payment was to be made, according to the true and legitimate meaning of the language of this instrument, and the partnership to begin, if ever, under this contract. Without the payment then, there was no sale; without the sale, this written instrument created no partnership. On the goods reaching Ocala, there was under it something to be done by Eichelberger in order to give force and effect to the agreement. At its date nothing had been done but to agree and to reduce their agreement to writing, signed and sealed. In the above quoted language of Parsons, "*an offer and acceptance.*" The goods were not there; no payment was made. The word "*sold*" in such an agreement means *contracted to sell*. 3 Wendell, 112; 3 Campbell, 326-7, and note. Upon the arrival of the goods, Johnston had done all that could justly have been expected of him under the agreement. The contract was not "*in fieri.*" It had not been actually commenced, never gone beyond the signing of paper. Suppose him to be there, and Eichelberger to claim partnership under the agreement, could not Johnston rightfully claim his pay first, justly refuse to recognize a partnership under that agreement unless the payment was then made? The agreement to the whole of the consideration on both sides, and the payment, was a condition precedent to the partnership. 2 Par. on Con., 189. And without the performance

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of which, Johnston could treat the contract as rescinded. 2 Par. on Con., 191; leaving both *in statu quo*. The first thing that Eichelberger in the agreement promised to do, was "to pay." Without that, there was no sale by that agreement, and no partnership. Suppose Johnston to have been absent, and Eichelberger to have taken hold and acted as a partner without paying, and Johnston to have afterwards acquiesced in such action. That would have been acting by virtue of some other or further understanding or agreement beyond and outside of the one that they had put in writing, and no such further or additional agreement is alleged. The bill filed is based upon the agreement in question, and should abide the correct interpretation of it.

But it is contended that the subsequent acts of Johnston constituted a recognition of the partnership under the said written agreement; a waiver of the breach of payment and a postponement of payment, which amounted to letting Eichelberger have the half of the goods as such partner on credit, which credit authorizes payment by set-off. That though Johnston was absent when the goods arrived, and Eichelberger took charge of them, yet when he returned he did not rescind the contract for non-payment, but allowed Eichelberger to continue to act as partner for several months, and until they disagreed about some other business transactions; and that even then, Johnston further recognized the said partnership by consenting to a division of the remainder of the stock of goods with Eichelberger, on the basis of said equal partnership, which division he, Johnson, broke up while in progress.

These acts of Johnston's might bind him to a partnership as to third persons, who are presumed not to know the agreement nor the breach of it; but Eichelberger knew the agreement and avers that he intended to pay Johnston only with a set-off. Under the true legal meaning of the written agreement, this intention of Eichelberger's was a deception upon Johnston. It was an effort to obtain pay for an unliquidated

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demand by a contract which made no mention of it, and the language of which meant payment to Johnston in money for half of the goods at once, or at most on the arrival of the goods at Ocala. Johnston finally boxed up and took the remainder of the stock of goods and denied Eichelberger's right to any of them, and that there ever was any partnership between them. Then Eichelberger came into a court of equity to enforce the said written agreement, (which he had never had nor attempted to get in his possession,) claiming it to have been a completed sale and to have established an equal partnership, giving him the right to have his former unliquidated money demand liquidated and paid by pleading it in an amended bill after answer, as a set-off for half of the original stock of goods, &c. He was better than *in statu quo*; he had taken out of the store \$1,834.58 worth of said goods at cost, which, if the said agreement was a perfected sale, and created a partnership, was a breach of it, for it obliged them to sell the goods, contemplating profits to both equally. Here was deception in the making of that written contract, a breach of the true meaning of its language, another breach of it according to the interpretation which he himself put upon it; and then, when refused any further access to the goods, a resort to a court of equity to enforce his plans. It is equitable to try to obtain payment of lawful demands; but neither law nor equity is intended to be invoked or used in aid of deception, over-reaching, and breach of contract, even in collecting a just demand. He who seeks the aid of a court of equity, must do equity, and come with clean hands. If Johnston permitted Eichelberger to act as his partner in the business of selling those goods, and to take a large part of them on his own account at cost, he cannot be held, without undisputed proof, to have done it under the original written agreement, for that, to say the least, was not binding on him after breach. He must have done it under some other

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consent, or understanding, or intention; that Eichelberger alleges nothing of.

It is unnecessary to go into a statement of the accounts, transactions, and demands by and between these parties, nor to decide all the points made in argument by counsel. The case is not one in which a court of equity could have exercised its jurisdiction for relief to Eichelberger, and the bill should be dismissed.

JOSIAH T. BUDD, EXECUTOR OF WILLIAM BUDD, DECEASED,
APPELLANT, VS. ROBERT GAMBLE, JR., APPELLEE.

When the defendant answers a bill in equity, reserving the questions of law, and at the final hearing the court is of opinion that there is not such a case made by the bill as will warrant relief, the bill should be dismissed. Judgment was entered in the county court in 1842, upon a promissory note made by defendant. No legal service of the summons was made upon defendant; but an unauthorized attorney entered an appearance for defendant at the return of the summons, and defendant alleges that he had no knowledge of the existence of the judgment until twenty years after it was entered; after which the judgment was revived by *scire facias*, and execution issued and levied upon defendant's property. Upon bill filed by defendant in 1868, alleging these facts, and seeking to enjoin the enforcement of the judgment, but failing to show that the defendant had a legal or equitable defence against the note sued on: *Held*,

1. That where the statute of limitations has intervened as to an action upon the note, equity will not relieve against a judgment upon the ground that the appearance of the attorney, upon which the judgment was based, was unauthorized; the party must show, under such circumstances, fraud, or a meritorious defence as well as irregularity.
2. A plaintiff cannot be held to inquire into and ascertain whether an attorney, who, in open court, upon the calling of the docket, enters an appearance for a defendant, is duly authorized to appear.

Budd vs. Gamble—Statement of Case.

This is an appeal in Chancery from the Circuit Court for Jefferson county.

Robert Gamble, appellee, filed his bill in equity in the Circuit Court of Jefferson county, in January, 1868, against the appellant, alleging that a judgment rendered against him on the 26th September, 1842, in the county court of that county, was revived by *scire facias* in the Circuit Court in May, 1867, and an execution had been issued thereon, and a levy made upon his property and certain funds attached by garnishment. The original judgment was rendered for \$113.90 and costs. The complainant alleges in the bill that he had no knowledge of the existence of the judgment until about twenty years after it was rendered, when William Budd ordered a levy to be made upon his property, but on complainant bringing the circumstances to his notice, Budd stayed all proceedings, and the matter there dropped for the time.

That an examination of the original summons shows that the sheriff returned the same executed by "leaving a copy thereof at the residence of Robert Gamble, Jr., in care of a person of lawful age, March 18, 1842;" that at that time he did not reside in Jefferson county; that the judgment was obtained by default, as shown by the record entry of the judgment; "that the note upon which the judgment was based has been paid and satisfied in full, and that the judgment was fraudulently and illegally obtained;" that in 1838, he made certain promissory notes to William Budd, Treasurer of Jefferson Academy, or his successors or bearer, while acting as agent for his father in renting certain land, and that a transfer of the land was subsequently made to one Edwards, "whereby Edwards was to substitute certain other notes in place of those of your orator;" that he can show that at the time the judgment was rendered, Budd had no valid claim against him; that the declaration does not allege any transfer of the note to Budd, and the judgment should have been rendered in favor of Budd, as Treasurer,

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&c., and is now the property of his successor and not of his executor; that complainant has had property in this State out of which the judgment might have been collected, but it was allowed to remain twenty years without attempting to collect it, and only since the death of Wm. Budd "his heirs have found this record which Wm. Budd had neglected to mark satisfied, but which was paid and discharged years ago"—all which is said to be contrary to equity and good conscience, wherefore the complainant prays an injunction against Budd, executor, &c., and the sheriff, and for general relief.

The answer alleges, after claiming and reserving the benefit and advantages he may have by way of plea or demurrer, that the complainant, by his attorney, D. C. Wirt, entered his appearance in the suit in the county court, and that the same appears of record, and that he suffered a judgment *nil dicit* to be entered against him; denies that the complainant can now, after over twenty years, inquire into the regularity and validity of the judgment; denies that the note or the judgment has ever been paid or satisfied; alleges that the note was the property of Wm. Budd; denies that any arrangement was ever made by which the note was to be exchanged for the note of Edwards, and that the statements in the bill in regard to these matters are untrue.

The complainant filed the general replication. Upon this, testimony was taken by the complainant, (under the objections and exceptions by the defendants,) and the Circuit Court decreed a perpetual injunction.

The defendant appealed.

A. L. Woodward, Sr., for Appellant.

I. *Equity Pleading and Practice.*—A defendant in chancery, by reservation in his answer, may have the same benefit he would have been entitled to by adopting the more concise mode of demurring or pleading, where vital defects exist in the merits of the case.

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2. Where a case is clearly cognizable at law, or destitute of equity, the answer reserving questions of law, the bill should be dismissed at the final hearing, if it does not present a case entitled to relief. 2 Dan. Chy. Pl. and Pr., 819; 6 Eng., 419-22.

3. The appellant having protested in his answer against the appellee's right to relief in chancery, after neglect of opportunity of a purely legal defence at law, it is therefore respectfully submitted whether appellant may not claim the benefit of demurrer or plea, under the general introductory reservation of his answer, as well as he might have under special reservation addressed to demurrable matter of the bill.

II. *Effect of Appearance*.—The appearance of an attorney in a case is binding on the defendant, even though unauthorized, or not specially retained.

2. The entry of attorney's name on the docket is an appearance for the defendant, and renders him subject to the judgment.

3. Judgments are not merely *prima facie* evidence of their validity, but conclusive, and parties are estopped by the record from denying their obligatory force.

4. The presumption is in favor of the regularity, and in support of the judgment of the court below.

5. If there is counsel present, unprepared, a motion for a continuance, or for a new trial, is the proper remedy. 1 Ala., (O. S., 1824,) 31; ib., 44; 2 Stew., 515; 3 Port., 262; 6 Port., 352; 6 Johns., 296; 8 S. & M., 421, 26 to 30.

III. *Relief in Equity*.—When the jurisdiction of a court of law has once attached to a cause, its decision is final as to all matters within its cognizance and operates as a bar to its litigation in the same or any other tribunal. Hence no degree of wrong or injury in the determination of a case at law will entitle the injured party to resort to equity, unless there is some special ground for its interposition—such special

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ground consisting of matter unavailable at law. 2 Story's Eq., 16 Ga., 398; 3 Lead. Cases in Eq., 181.

2. The general rule is, that the estoppel of a judgment extends to all points involved in the cause, though in fact left undetermined. 1 Baily's Eq., 107; 2 Smith's Lead. Cases, 669; 3 White & Tudor's Lead. Cases, Hare & Wallace's notes, 182.

3. A party cannot ask for relief in equity on the ground that he has omitted or failed to make a defence at law. *Ib.*, 183, and authorities cited.

4. This rule is absolutely inflexible, and cannot be violated, even when the judgment in question is manifestly wrong in law, or in fact; or when the effect of allowing it to stand will be to compel the payment of a debt which the defendant does not owe, or which he owes to a third person, or which has in fact been discharged. *Ib.*, 183.

5. Nothing is better settled, in general terms, than that a judgment will not be restrained by injunction on grounds purely legal, unless a defence has been prevented at law by fraud on one side, or ignorance, unmixed with negligence, on the other; and when this is not the case, no degree of hardship or injustice, which can result from allowing the judgment to stand, will justify the intervention of equity to set it aside. *Ib.*, 195.

6. Nor will the ignorance or misapprehension of the defendant, or his attorney, justify interference with a judgment to which he has assented, however clear the evidence that a case has been sacrificed, which might have been successfully prosecuted or defended. *Ib.*, 194, authorities cited. Cases granting injunctions in conflict with these rules, must be regarded as anomalies, and not merely exceptions.

7. Even in cases of undue advantage taken on one side, resulting in injustice on the other, relief must be based even more emphatically than in others of the same nature, upon a distinct allegation of fraud in the bill, (*How. Miss.*, 132, 4 *How. Miss.*, 132, 4 *Ga.*, 175,) and will not be granted in

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opposition to a distinct and explicit denial in the answer. 1 S. & M., 108; 12 S. & M., 538; *ib.*, 199.

8. Moreover, a judgment will not be set aside in chancery on the ground of having been improperly or even fraudulently obtained, unless the defendant can show that he has a defence which would be good if not precluded by judgment. 8 Vt., 18; 23 Vt., 720. It was said, in *Mason vs. Sneadley*, although the judgment has been obtained in such a manner that it ought not to bind the complainants, yet it would be useless to interfere, if the debt for which it is rendered be just and equitable, so that if it were set aside, a court of law would be compelled to render a like judgment. *Ib.*, 200.

Selected Cases.—1 Ark., 186, 195, 196; 7 Eng., 401, 413, 414, 416, 417; 14 Ark., 360; 10 Gratt., 506, 510, 511, 512; 24 Vt., 351, 352, 353; 1 J. J. Mar., 272, 273, 274; 8 Ala., 767, 769, 770; 2 Stew., 312, 313, 314.

R. B. Hilton on same side.

As between the parties, the return of the sheriff is conclusive upon all matters returned, and cannot be contradicted by such parties or their privies. 45 N. H., 124.

The return of the sheriff cannot be traversed, except for fraud or collusion. 28 Ga., 496.

Where attorney appeared, though without authority, and defendant was never served with summons, a court of chancery will give no relief, unless the attorney is shown to be insolvent. 37 N. H., 512; *see, also*, 10 S. & M., 563.

As to authority of attorney and conclusiveness of record, *see* 5 Dana, 11.

The presumption will be made after twenty years in favor of every judicial tribunal acting within its jurisdiction, that all persons concerned had due notice of its proceedings. 1 Greenl. Ev., *sec.* 19; 4 How., 161.

The looseness of the statements in the bill, and the laches of the complainant, are conclusive objections to granting the

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relief sought. 6 Fla., 347; Hilliard on Injunc., 29, 30, 31; 22 Ga., 127; 5 Cald., 371; 21 Barb., 129; 2 Min., 239.

A judgment will not be set aside in equity on the ground it has been fraudulently or improperly obtained, unless the complainant is able to show that he has a defence which would be good if not precluded by the judgment. 11 Wis., 391; 23 Vt., 720.

Nor is there such averment of fraud as would authorize the interposition of chancery. 7 Eng., 401.

Judge Story (2 E. Ju., sec. 898,) says: "Courts of equity will not grant an injunction to stay proceedings at law merely on account of any defect of jurisdiction of the court in which the proceedings are pending;" citing, as for example, in the note, "As where no process had been served on the defendant." 8 Ala., 500, 767. To the same point, see note to Adams' Equity, side p. 198; 11 Wis., 391.

The case in 11 Humphreys (and one or two kindred cases cited on the other side.) are "anomalies"—so pronounced in American Notes to Lead. Eq. Cases, p. 197.

Suits on judgments, obtained in courts where rendered, to be distinguished from suits on judgments of other States. 8 S. & M., 428; 2 Am. L. Cases, 719-15.

S. Pasco for Appellee.

The judgment being by default, we have a right to look into the regularity of the proceedings of plaintiff in the cause. 1 Fla., 378; 1 Robinson's Pr., 261. The mode of service of the original writ is before the court in complainant's bill of complaint, which was "*by leaving* a copy thereof at the residence of Robert Gamble, Jr., in care of a person of lawful age." The mode of service is prescribed by statute of November 23, 1829. When service is perfected thereunder by leaving at the residence, it must be left "with some person of the family above the age of fifteen years, and informing such person of the contents thereof." It does not appear

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from the sheriff's return, that the said copy was left with any member of complainant's family, nor that the sheriff took the pains to inform the person with whom he left it as to its contents; and it appears from the testimony adduced that the complainant was a non-resident of the county at the time, so that, without disputing the record at all, it does not of itself show any legal service. This fact of non-residence is not denied by defendant in his answer to the bill, but he rests upon the appearance entered by Mr. Wirt, and claims that it cures all prior defects. This, of course, would be true, if Mr. Wirt had authority to act for the appellee, but the testimony proves that he had no authority at all; that there was no privity between them, and there would be no equity in binding a party by a judgment which derives all its validity from the action of a third party, against whom it was rendered. The law even goes so far as to say that if an attorney appears for his client without a warrant, that the judgment, under some circumstances, shall not stand, as where the attorney is not responsible, so that if the attorney exceeds his authority, his client is not necessarily bound thereby; and even if, in the present case, the relation of attorney and client had existed between said Wirt and appellee, there would be strong reasons for the interposition of a court of equity. The mistake of said Wirt, and the fact that the appellee has no relief for the injury done by action against said Wirt, he being without the jurisdiction of the court, no longer one of its attorneys, and the act being covered by the statute of limitations, so that said Wirt is not responsible. Jacob's Law Dic., art. "Attorneys at Law," reference to 1 Salkeld. 88; 1 Tidd's Pr., 107; 1 Bacon's Abr., 296; 2 Yeate, 546.

Where the attorney makes an unauthorized appearance, the general rule is, that it cannot bind the party he pretends to represent, and this was the ruling of the court below, though the books are filled with decisions where relief was refused at law upon these grounds. 6 Johns., 34; 7 Har.

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& J., 275; 5 Har. & J., 478; 2 Har. & Gill, 374; 6 Johns., 296; 1 Tyler, 304; 7 Pick., 137; 4 Mo., 228; 4 Dev. & Bat. N. C., 454; 9 Shep., 128; 3 Green, 234; 6 Blackf., 123. It remains for us to inquire what remedy the appellee has against this wrong and injustice. The appellant, in his first error assigned, points us to a court of law, and says we have had an opportunity of full defence and adequate relief there. Surely not in the original suit in the County Court, for the appellee was a stranger to the proceedings there. Could this defence have been presented at the revival of the suit by *scire facias*, it might perhaps have been reached then, had the record shown no service and no appearance upon its face. But all is apparently regular. The judgment was voidable, but not void, and until vacated, it was valid; and the court, in re-affirming it upon the proceedings in *sci. fa.*, re-affirmed it with all the original equities against it. It prolonged the former existence—it did not create anything anew. Such has been the language of this court hitherto, and this language has directed and controlled the courts of this State. 2 Fla., 165, reference to 2 Sellon's Pr., 187-88; Jacob's Law Dic., *scire facias*. An established English authority, in defining this writ, says: "By the statute it is ordained in lieu of a new original, and therefore judgment upon the *scire facias* shall have the same effect as upon that." Again: "Though the judgment was void, yet execution might be by *scire facias*. For upon a voidable judgment a man shall recover and may take out execution, and that it should stand good until the judgment was reversed." Ref., to God., 96. In a recent case decided in England, the court ruled that it "cannot refuse to issue a *scire facias* to obtain execution on the ground that the judgment is erroneous on its face." Law Rep., 2 Ex., 284, reported in 3 Am. Law Rev., 123.

The Virginia courts have ruled that "a judgment suspended by an injunction, may be revived on the death of either party; and the injunction operates on the judgment

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or *scire facias*, prohibiting the issue of execution thereon." 11 Gratt., 190, quoted in Hilliard on Injunc., 226. The decision of the Arkansas Supreme Court, in the case of *Pile ex parte*, seems to conclude the matter: "A void judgment by *scire facias* does not make it valid, though the defendant appear and plead to the writ." 9 Ark., or 4 Eng., 336. The language of the Georgia Supreme Court, and others, (22 Ga., 127, Hilliard on Injunc., 202,) indicates that the application for relief should be made in a court of equity. The judgments of courts cannot be lightly interfered with, and it is only when strong equitable grounds are presented that relief will be there afforded. Hilliard on New Trials, 460, p. 20, and 463, p. 25; 30 Ala., 352; 11 Hump. Tenn., 523; 1 Head Tenn., 229; same in H. on Injunc., 190, p. 30, and 200, p. 43; 16 Ala., 95; 6 How., 186; 6 Pick., 239-40; 5 Cald., 371; 6 Littel, 186; 8 Ala., 745; 2 Am. L. C., 787. Even if the case now presented would have entitled the party to relief at law, it was not available at the return of the *scire facias*; the bill is based upon the surprise in the pleadings. The appellee there alleges that "he had no knowledge of the existence of the said judgment until about twenty years after it was rendered;" that when the matter was at last brought to his notice, he brought the circumstances to the notice of appellant's testator, who voluntarily stayed all proceedings; that appellant, after his testator's death, brought the matter up again, and when the appellee was brought into court, nearly twenty-five years after the alleged suit, it is no matter of wonder that he found it impossible to make a defence, as he alleges, even if it could have been there made. Even when he filed his bill, in January, A. D. 1868, he had not been able to meet the matter fully, for the witness upon whom he principally relied lived in a remote State, and had to recall circumstances a quarter of a century old. It is difficult to determine what is meant by the second error assigned. There is no ignorance nor misapprehension of the attorney who entered an appear-

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ance in the proceedings under the *scire facias* in the Circuit Court, alleged in the bill or answer. If it is intended to refer to the mistake of the attorney whose name was entered upon the docket in the County Court, we claim that no man can be concluded by proceedings to which he is a stranger; or, in the words of C. J. Marshall, "it is a principle of natural law of universal obligation, that before the rights of an individual can be bound by a judicial sentence, he shall have notice, actual or implied, of the proceedings against him." 1 Greenl. Ev., p. 22; 3 Peters' Cond. Rep., 306; 9 Cranch, 126.

In reply to the third error assigned, the appellee urges that it is hard to prove the payment of a claim more than a quarter of a century old. The presumption of law is against a stale demand, and the conduct of appellant's testator has favored this presumption. He could and doubtless would have collected this claim during the long period that intervened between the rendition of his judgment and his death, had he been satisfied that it was a just one. This presumption is further strengthened by the oath of the appellee in his bill, and the affidavit filed with the bill, and the denial of the appellee of a fact which was not within his own knowledge amounts to nothing. There is, then, every reason to believe that upon a full trial at law, the claim could not have been sustained.

There is no law authorizing the prosecution of a claim against a man without notice to him, and of entering up a judgment against him without his knowledge, and allowing the party interested to keep his judgment a secret for twenty years, and then surprising the party thus sued with a stale demand that has nearly passed out of his mind; and if such proceedings have gone on under the name of law, equity will interfere to prevent the collection of such a claim, for it follows the law, not blindly, but with corrective powers, and where fraud has wrested the law so as to work injustice in

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its name, equity will come to the aid of the law and strip the wrong doer of the advantage he has unjustly gained.

RANDALL, C. J., delivered the opinion of the Court.

It is a fundamental maxim in courts of equity as well as of law, that no proof can be admitted of any matter which is not noticed in the pleadings; and also that the complainant must state a case in his bill which entitles him to relief, or he can have no decree in his favor. He must introduce into his bill every material fact which he intends to prove. Daniel's Ch. Pl. and Pr., 850. And it is said farther, "with respect to claiming the same benefit by answers that the defendant would be entitled to, if he had demurred to the bill, or pleaded the matter alleged in his answer in bar, it is to be noticed that it is only at the hearing of the cause that any such benefit can be insisted upon; but that at the hearing of the case the defendant will in general be entitled to the same advantage of this mode of defence that he would have had if he had adopted the more concise mode of defence by demurring or pleading." *Ib.* Where the defendant answers the bill, reserving the questions of law, if at the final hearing the court be of opinion that there is not such a case made out by the bill as will warrant relief, the bill should be dismissed. *Meux vs. Anthony*, 6 Eng., 411.

The bill in this case states that the complainant "had no knowledge of the existence of the judgment" until twenty years after it was rendered, and that the return upon the summons does not show a legal service upon him. All this may be true. The return certainly does not show a proper service and does not confer jurisdiction of the person of the defendant. But notwithstanding all that is alleged, the judgment may be regular and binding upon the complainant, for he nowhere states in his bill that he did not appear to the action in person or by attorney. The fact that he resided in another county is of no importance, as the indebtedness occurred in Jefferson county. To entitle himself to

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defend against the judgment, he should have shown in his bill not only that he was not served, or had no notice of the institution of the suit, but that he did not appear therein in person or by attorney; but as he denies only the regularity of service and his residence in the county where the suit was brought, he leaves it open to the legitimate inference that he appeared to the action, and in this he fails to allege any defect in the jurisdiction of the County Court. Moreover, the answer expressly alleges that the complainant did appear to the action in the County Court by his attorney and said nothing in bar of the action. Instead of amending his bill in this particular and impeaching the authority of the attorney who appeared for him, (if one did appear,) he merely filed a general replication insisting upon the matters alleged in his bill, and denying generally the allegations in the answer.

The only matters set up in the bill which could be held to make a case of merit, independent of the question of the want of jurisdiction, is a general allegation of payment, and this allegation is explained in the bill itself to be the conclusion of the complainant, drawn from the alleged fact that he had arranged with Edwards to surrender to him certain leased lands, for the rent of which the note had been given, and that "Edwards was to substitute other notes in the place of the complainant's." There is no allegation that such substitution was made. The bill does not set up that Budd had any notice of such agreement, or of any fact by which his rights could in any respect be affected by an agreement between Edwards and Gamble.

We assent to the doctrine that where the statute of limitations has intervened, equity should not relieve against a judgment at law upon the ground that the appearance of an attorney, upon which the judgment was based, was unauthorized. The plaintiff must show under such circumstances merits as well as irregularity.

A plaintiff cannot be held to inquire into and ascertain

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whether an attorney's appearance is authorized, whenever in open court upon the calling of the docket, an attorney enters an appearance. Where the statute of limitations intervenes and equity enjoins the judgment upon this ground, the clear result is to make the plaintiff lose, when he certainly was not in fault. The very least that should be required would be to show insolvency of the attorney, and while the question is not necessarily involved in this case, we think that merits as well as insolvency should be shown where the statute intervenes.

The issues of fact in this case were upon the matters contained in the bill, which, as we have seen, fails to present a material issue, and it is therefore unnecessary to look at the proofs for the purpose of disposing of the case. See *St. Andrews Bay Land Company vs. Campbell*, 5 Fla., 560.

We are disposed, however, to look further into the record for the purpose of determining whether the complainant may not, by amending his bill, present such a case as will entitle him to relief. No facts are charged which show any fraud or collusion in the matter.

In his testimony the complainant swears that the first intimation he received of the institution of the suit was in 1862, when the sheriff of Leon county informed him that he had been directed to levy upon his property; that he never knew that Budd had any valid claim against him; "that the note on which the suit was brought, was one of several given to the Commissioners of the School Fund of Jefferson county, for the rent of certain lands for a term of years, that by the consent of the Commissioners the notes were retired, being substituted by those of John A. Edwards, to whom they transferred the lease, and he was of the *impression* that all of his notes had been cancelled."

This is the evidence relating to the *payment* or discharge of the note. He remembers the transaction and that an arrangement was made, but that this note was included he has only an impression, and we cannot say that this proves

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either an averment that the note was paid, or that it was discharged in any way.

The complainant also testifies, (and is supported by the attorney, Wirt,) that he never employed Wirt to appear for him, and Wirt says that he entered his appearance in the suit under a misapprehension, supposing the suit to be against another person of the same or a similar name.

The preponderance of authority leads us to the conclusion that in cases like this the court will not interfere and enjoin the judgment unless fraud is disclosed in the proceedings, or unless the party shows clearly that he has been unfairly deprived of the opportunity of making a valid defence upon the merits, or that it would be "against conscience" to execute the judgment. There can be no precise rule laid down which should control all cases of similar or proximate general character. This remark is justified by an examination of the decisions of various courts in analagous cases.

The courts do not sustain judgments entered against defendants without notice and without appearance; such proceedings do not bind defendants on account of the defect of jurisdiction over the person. In cases like the present, however, where it appears that an unauthorized attorney has appeared for a party, and the appearance has not been subsequently adopted by him, some courts have relieved against the judgment entered without regard to any other circumstances. Without exception, we believe, the cases in which this relief has been granted show that the application has been made very soon after judgment rendered. In general, however, the party has been held by the judgment and referred to the unauthorized attorney for redress, unless the attorney was insolvent or a "suspicious person." But courts of chancery have in such cases very uniformly allowed the defendants to show a fraudulent collusion between other parties and the officers or attorneys in obtaining the judgment, or to show that he had a meritorious defence, of which he was deprived by fraud, or accident, or mistake, and that it

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would be "against conscience" to execute the judgment, and upon this to grant relief.

Here, the complainant had executed a negotiable promissory note, upon which the judgment was rendered twenty-eight years ago. To grant unconditional relief upon the showing that the attorney who appeared for him had no authority to appear, would be to relieve him from the payment of his debt if the statute of limitations be interposed. It does not appear that the note was ever paid or otherwise discharged. The purpose of a judgment is to establish the indebtedness and decree its payment. The original indebtedness is confessed and is not shown to have been paid, nor does it appear that the complainant ever made inquiry as to the whereabouts of the note. Under such circumstances, it would be manifestly against equity to relieve against this judgment upon the proofs.

The testimony seems to have been taken to meet the case as though it had been well stated in the bill, and if it had appeared by the testimony that the complainant was entitled to relief, we might direct that the bill be amended to conform to the case proved, but as this does not appear, our judgment is that the decree must be reversed and the bill dismissed.

HART, J., delivered the following opinion of the court, upon a petition for rehearing which was filed herein.

Appellee petitions for a rehearing, on the ground that the affidavit of H. R. Edwards and O. H. Gadsden, stating in substance that the note in question was settled, as alleged in the bill, in 1838 or 1839, referred to in the bill as exhibit B, and as being on file, was not sent up in the record, and this court has had no opportunity of examining it.

It appears that this affidavit was amongst the papers of the case, in the office of the Clerk of the Circuit Court in Jefferson county, but had no file mark and was not copied into and sent up in the record to this court. The substance

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of it is set forth in the bill, and the complainant was examined as a witness and had the benefit of his testimony.

It does not appear that the affiants were examined as witnesses to prove the statements in their affidavit, (which itself could be of no avail as evidence at the hearing,) and can be of no use here now. The complainant had his opportunity to take their testimony and have the benefit of it, and it does not appear that he did so.

Rehearings and new trials are allowed for the purpose of correcting the mistakes and misapprehensions of the court. Nothing of this kind appears or is suggested in this proceeding. It is not a safe or tolerable practice to grant rehearings for the purpose of allowing a new case to be made by an amendment to the bill, and new testimony to be taken to meet the new case thus presented. The form of our decree was dictated by the absence of such proofs as would have entitled the complainant to relief.

No good cause is seen for granting a rehearing, and it must be refused.

THE COUNTY COMMISSIONERS OF COLUMBIA COUNTY VS.
WILLIAM BRYSON, *et al.*

1. A writ of error is not the proper process to bring up for review an order or decree in a suit in equity; the only method known to our statutes is an appeal. *Held,*
2. Courts of equity will not interfere by injunction to stay proceedings upon a writ of *mandamus*.
3. An injunction will not be granted if the party seeking it could, by proper vigilance, have protected himself by the ordinary means at law, or where the case in equity proceeds upon a defence equally available at law.

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4. A proceeding by *mandamus* does not abate by a change in the membership of the municipal body, as by the resignation of members of a Board of County Commissioners and the appointment of new members.

Writ of error to the Circuit Court for Columbia County.
The case is stated in the opinion of the court.

McLeod, Niblack & Broome for Plaintiffs in error.

J. J. Finley and Sanderson & L'Engle for Defendants in Error.

Mr. Justice HART, on account of interest, did not sit in this case.

RANDALL, C. J., delivered the opinion of the Court.

This was a suit in chancery, brought by the County Commissioners of Columbia County against William Bryson and the sheriff of that county, for an injunction and general relief. The Judge of the Circuit Court refused to grant the injunction and dismissed the bill, whereupon the complainants sued out a *writ of error*, in pursuance of which writ a return is made to this court.

The Supreme Court of this State, in *Bradford, executor, vs. Marvin*, 2 Fla., 101, decided that a writ of error could not be used as a process to remove an equity cause to this court. This is in accordance with the terms of the statute, and with the uniform practice where the distinction between suits at law and in equity has not been abolished.

However, it may be proper to refer to some of the questions argued by counsel in presenting the case. The facts are briefly these:

James Stephenson and four others, as county commissioners of Columbia county, filed their bill in Columbia Circuit Court, praying an injunction against Bryson and the sheriff of that county, to restrain them from serving and enforcing, peremptory writ of *mandamus* issued out of the Circuit Court. In 1860, Bryson filed his petition for a writ

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of *mandamus*, to be issued for the purpose of compelling Silas L. Niblack and others, then county commissioners, to levy a tax to pay certain coupons representing the interest upon bonds issued by the commissioners under the 22d section of the act known as the Internal Improvement Act, approved January 6, 1855, in payment of stock subscribed by them in the Florida, Atlantic and Gulf Central Railroad Company. An alternative writ was issued and served, and on hearing the return of the commissioners, the court awarded a peremptory writ of *mandamus*, in pursuance of which a tax was levied, and the collector seized property to satisfy the tax against one of the citizens, when Bryson's counsel requested the collector to suspend proceedings for the time, and the tax was not collected. The matter remained thus until 1867, when Bryson moved that another peremptory writ be issued under the proceedings had in 1860, and another writ was awarded to be directed to Geo. B. Smithson and others, the successors of Niblack and others, as county commissioners.

From the order awarding this writ an appeal was taken, bond given, &c., but soon afterwards the courthouse and records of Columbia county were destroyed by fire, to-wit: October 9th, 1867. At the spring term, 1868, the records in the case were re-established, and the court thereupon directed a peremptory writ to issue as soon as a board of county commissioners should be organized. On the 15th October, 1868, this writ was issued pursuant to the order made in April, 1867, directed to and commanding the complainants to levy and collect the tax, and the writ was served upon the complainants. No action was taken toward the further prosecution of the appeal, nor for its dismissal.

It is claimed that the former writ was directed to the commissioners named, but not to their "successors in office," and hence, that the force of the writ was expended, and no alias writ could issue to the successors in office. It is further claimed that no order could be made by the Circuit Judge

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after the appeal, until the appeal was disposed of by the Supreme Court; that they were deprived of the benefits of their appeal by the destruction of the records; that they relied on their return to the alternative writ; that the counties of Suwannee and Bradford had been taken from the territory of Columbia county without the consent of the latter, and that the new counties had not been made parties in the proceedings, nor had Columbia county any means of compelling them to contribute; that the only proper remedy of Bryson was by suit at law upon the bonds or the coupons, and that the act under which the bonds were issued was unconstitutional and void, and the bonds were therefore void. It is further claimed that new facts have come to their knowledge, which, if known and pleaded, would have led to a different result; but no new facts are stated in the bill which can avail the complainants.

It is further claimed that the basis upon which the bonds were issued was in part slave property, which has been taken from the citizens by the State without making compensation therefor, and that the new constitution prohibits the levying of taxes upon persons for paying the interest of any bonds issued by counties or corporations for the benefit of any chartered company, and therefore the tax cannot be levied at all. Wherefore, the complainants pray for an injunction and for general relief. Upon presenting the motion for injunction upon the bill and accompanying affidavit, the judge denied the motion and dismissed the bill, which order is alleged to be erroneous.

We are met here by the objection, on the part of the appellees, that courts of equity will not interfere by injunction to stay proceedings on a *mandamus*. Story's Eq. Juris., sec. 893, says: There are cases in which courts of equity will not exercise jurisdiction by way of injunction to stay proceedings at law in any criminal matters, or in cases not strictly of a civil nature, as, for instance, they will not grant an injunction to stay proceedings on a *mandamus*, or an in-

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dictment, or an information, or a writ of prohibition. 2 Ves., 396.

Lord Hardwicke allowed a demurrer to a bill for an injunction to stay proceedings on a *mandamus* issued to compel the lord of a manor to hold a court, and said that "the court has no jurisdiction to enjoin proceedings on a *mandamus*." An injunction will not be granted if the person seeking it could, by proper vigilance, have protected himself by the ordinary means at law. See 3 Dan. Pl. and Pr., 1723, 3 Am. ed., where numerous authorities are cited; and Story's Eq. Juris., sec. 894, quotes: "Courts of equity will not relieve against a judgment at law, where the case in equity proceeds upon a defence equally available at law, but the plaintiff ought to establish some special ground of relief. The doctrine goes yet farther, and it may be asserted to be a general rule, that a defence cannot be set up as the ground of a bill in equity for an injunction, which has been fully and fairly tried at law, although it may be the opinion of a court of equity that the defence ought to have been sustained at law. If there are any exceptions to this rule, they must be of a very special nature. But relief will be granted where the defence could not, at the time or under the circumstances, be made available at law without any laches of the party." This question was considered by this court in Dibble vs. Truluck, 12 Fla., 185.

If it were competent to grant an injunction in a case of *mandamus* to restrain the writ, it is not considered that the circumstances of the present case present a proper case for injunction. The "newly discovered facts," as disclosed, are facts which were patent at the trial, and if their presence was not then *discovered*, it was not because the discovery was difficult. Indeed, it appears from the bill that all the material grounds of defence were urged before the chancellor, and the complainants were embarrassed for a time, and prevented from prosecuting their appeal by the destruction of the record; but in the meantime, no advantage was

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taken of them by the appellee by dismissing their appeal, and on the restoration of the records, the appeal could have been prosecuted; and, for aught that appears, the appeal is yet pending, and the same questions suggested by the bill are presented in the record, and may be heard and determined in that proceeding, unless the parties have abandoned the appeal.

The question of the constitutionality of the act of the Legislature authorizing the issuing of the bonds is also necessarily involved in the merits of the case, and may be presented to this court upon the appeal.

It is further urged that the original writ of *mandamus* was directed to the then county commissioners, and not to their successors in office; and hence, when those commissioners went out of office, the writ was fully expended and defunct. But it appears that the writ was directed to them as commissioners, and not as individuals, no personal claim being made upon them except that they perform an official duty enjoined by law.

On this subject, we give the language of the court in the case of *Graham, et al., vs. Maddox, the City of Maysville and others*, found in the *Am. Law Reg.*, vol. 6,589, (affirmed in 2 Met. Ky., 56,) in which the judge says: "The interest is still in arrears, and the authorities are in default, and it can be corrected in no other *effective* way but by a *mandamus* to collect as well as to levy the tax. It will not do for the defendant to say there has been no refusal to levy; they have at least failed to levy. They have not collected the money or paid the interest, and the object of the proceeding is to require them to do it. The majority of the council of 1857 had this motion for a *mandamus* continued, and it passed over necessarily to the present term. In the meantime, by a regular election under the charter of the city, the members of the council have changed, and the present members contend that no *mandamus* should issue, because they are not in actual default. They oppose the constitutionality

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of the subscription and tax, and are determined not to levy or collect it. This proceeding is intended to operate upon the council. The council is a perpetual body, though its members may change; and that body being the authority required by law to make this levy, has been in default as to the performance of this duty since a proper period for levy in 1857. The change in the membership does not alter the fact that the council has not yet performed that duty. The proceeding did not abate by the change of some of the members of the council. In the present stage of the proceeding, it was against them as members of the council—that is, against the council, not as individuals, and the change of membership may have rendered it necessary, as was done, to renew the notice, or serve it upon the new members, but it would not abate the proceeding. Were the positions contended for by the defendants correct, how easy it would be to baffle forever the creditors, and prevent the enforcement of this duty. The order being made for a levy, with but little time for collection, before another term of the court at which it could be ascertained whether the order was complied with, new members would come in, and they could set up the plea that they should not be held responsible for the acts of their predecessors. The old members could say they were out of office, and had no power to make the levy, and thus the matter would go on in one continued round from year to year, and the plaintiffs would be forever denied their rights. Such cannot be the law or a correct practice. It seems to the court, therefore, that the correct practice is to regard the duty as one to be performed by the council as a body, which is the same from year to year, though the membership may change. To bring the body before the court, it is necessary to have the process served on the members. The default of the council in the performance of a duty in 1857, is still a default of the council in 1858; and, although the court could not and would not attach or punish members of the council of 1858 for the default of different members

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of 1857, yet the change of membership would not alter the fact that the legal body or assembly was in default, nor affect the powers of the court to require the duty to be performed; and upon the failure of the body; after such requisition of the court, it would be competent for the court to use such measures against the individuals composing the body, to enforce the requisition, as the law provides."

But it is unnecessary to pursue the subject further in this case. We have indicated that, in our opinion, the bill in equity cannot be maintained, and lest the appellants might be embarrassed by a direct adjudication of the several matters contained in the bill, in case the parties should see fit to take further steps in the appeal or otherwise, we think it our duty to dispose of the case by dismissing the writ of error, although the case was fully, and, we will say, very ably and industriously presented upon the merits.

The writ of error is dismissed.

JOSIAH T. BUDD, ADMINISTRATOR OF JACKSON KEMP, DECEASED, APPELLANT, VS. WM. RYAL LONG, APPELLEE.

1. Where the land of one is levied upon to satisfy the debt of another, a bill for injunction may be maintained to restrain the sale, notwithstanding the party injured may have an action at law, an actual sale having the effect of bringing a cloud upon his title and affecting the value of the property to an extent not easily susceptible of measurement or redress at law.
2. A Court of Equity will not enjoin a judgment and execution on the ground that there were errors and irregularities in the proceedings anterior to judgment, the correction of such errors being the proper subject of motion or writ of error.

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1. A levy by virtue of an ancillary attachment upon lands, creates a lien upon the land, of which subsequent purchasers are bound to take notice, and an irregularity anterior to the issuing of the attachment does not affect the lien.
4. A free colored person was not in the year 1868 prohibited by law from taking titles to or owning real estate in this State.

Appeal from the Circuit Court of Jefferson county in equity.

The case is stated in the opinion of the court.

A. L. Woodward, Sr., for Appellant.

I. *Criminal Action*.—A judgment may be impeached in a court of equity for fraud, never for irregularity, the correction of error being the exclusive province of a court of law. 3 John. Ch., 375.

The appearance of appellee's vendor by attorney in the Circuit Court, without exception taken, was a tacit waiver of any irregularity in the proceeding in attachment, as well as in the action at common law. 1 Ala., (O. S.) 31 and 44.

Omissions and defects in affidavit and bond in a proceeding in attachment are not available on error, unless presented by plea in abatement in the court below. 6 Ala., 24; 9 Ala., 211, 214, 231.

Fraud.—It is respectfully submitted whether the sale and purchase of these lots *pendente lite*, did not infect it with the fraudulent intention alleged in the affidavit in attachment, and the concurrence of the appellee be inferable from its proximity in time to that proceeding, in connection with inadequacy of consideration, Confederate currency being then three for one in specie value. 1 Story Eq., (Fraud) Sec. 258, '59, 349-369, 405; 2 White & Tudor's Leading Cases in Equity, 90, 91, 171-72.

In case of legal rights, the doctrine of *caveat emptor* applies, though equitable rights may be lost by sale to a *bona fide* purchaser without notice. 2 Munf., 316; 1 Wash., 211.

In this case legal rights alone are involved, and appellee

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had constructive notice, by *lis pendens*, affecting the entire subject matter of the contract, as well as the particular lot on which the levy of the writ of attachment created a specific lien.

It is farther submitted whether the refunding of the purchase price of the lots did not operate as a vital rescission of the contract by mutual consent, and render all the lots conveyed by the deed subject to the judgment subsequently obtained in the original action against appellee's vendor, equally with the one levied on under the attachment proceeding. If the appellee might have claimed rescission of this contract in a court of equity for defect of title, ought not a voluntary rescission of the contract by the parties to be sustained? In the first, it would be, even in case free from fraud, for benefit of vendee; in the second case, it ought to be, for intended fraud on creditors which failed of consummation. Equity considers what ought to be as having been done. 1 Story's Equity; 3 Mon. 542.

Effect of Answer in Chancery.—Where a general replication is put in, and the parties proceed to a hearing, all the allegations to the answer which are responsive to the bill, are to be taken as true, unless they are disproved by two witnesses, or one witness and corroborating circumstances. 2 White and Tudor, 124-125.

An answer is responsive to the bill when it is a distinct, explicit and unequivocal reply on personal knowledge to a material statement or allegation, even though presenting matter in avoidance, and affirmative in character. 4 Cow., 316-43; 9 Cranch, 153. Nor is the effect of such answer impaired, though made by respondent in a representative character, the effect being due to source of the knowledge, and not the conduct which conveys it.

II. *Proceedings in Attachment Levy.*—The universal maxim of evidence in relation to judicial proceedings becomes peculiarly applicable to the proceeding in attachment

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in the court below. "*Omnia praesumuntur rite esse acta.*"
1 Starkie Ev.; 4 S. & M.

The want of the clerk's signature to the affidavit does not render it void, the oath of the party being the substance, the official signature mere form. Like a *fi. fa.* in a similar case it is amendable, and the court will consider it amended where the question arises collaterally. See 5 N. Car., 24, 421; 3 Minn., 128; 3 Dev., 151, 284; 1 Serg't & Rawles, 97; Coleman's Case, 55; 5 Wend., 303. Courts favor judicial and final process. 9 Mass., 217; 10 Mass., 221; 11 Mass., 89; 13 Pick., 190; 14 Pick., 212.

As a general rule, the validity of a sale of property is protected, unless the proceedings under which it was made are absolutely void—*vide* 5 How. (Miss.) Rep., 253; Caines' Rep., 267; 8 Cow., 548; 4 Monroe, 464-74—a *fortiori*, as to the affidavit in attachment. See 10 Ala. Where process and proceedings are merely erroneous and voidable, they can be avoided only by the party, and he cannot make the objection collaterally. 16 Johns., 539; 1 Cow., 736; 2 Ala., 670; 5 How. (Miss.,) 253.

The proceedings by attachment, under our statutes and judicial decisions, are held to be (as in other States) of the nature of a proceeding *in rem*. The levy or "service of the writ of attachment binds the property, except as to pre-existing liens." Thomp. Dig., p. 368, sec. 5; *ib.*, sec. 1; 3 Fla., 2, 3; see also 4 Fla.; 9 Fla. The effect of the levy in the proceeding in attachment must be the same, whether attachment be the basis of the suit, or merely ancillary to the original action at common law. The lien created by the levy enures to the benefit of the plaintiff, and is confirmed by the judgment in his favor, when the attachment has not been dissolved.

The effect of a purchase *pendente lite* is not to render the contract *void*, but merely that the purchaser becomes thereby chargeable with notice, and is bound by the judgment or decree against the person from whom he derives

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title, without being made a party. 1 Story's Eq., 394; Madd. Chy., 1 and 1; 5 Ohio, 460.

By the levy of the writ of attachment or seizure, the property taken and held within the jurisdiction of the court, in the same manner as in an admiralty proceeding, or where a court of chancery seizes property to be administered or disposed of. 20 Vt., 632; 6 B. Mon., 651; 7 Eng., 564-65. It follows from this principle, that the title of a purchaser under an attachment relates to the levy of the writ and becomes subject to the lien created by it, while it cuts off all junior liens, encumbrances and purchasers. 13 Mass., 73; 20 Vt., 189; 17 Conn., 67.

The following authorities show fully the nature of the lien created by and the effect of a levy under an attachment. 1 Story's Eq., 393; 5 Mon., 73; 1 Litt., 307; 2 Dana, 408-9; 3 Atk., 356; 1 Johns. Chy., 356; 1 Ms Lean, 95; 17 Pick., 271; 19 Pick., 344; 14 N. Hamp., —; 4 S. & M., 578; 1 Ala., 678; 8 Ala., 606-13-16-19; 7 Eng., 564-65; 15 Eng., 343-44.

The levy of the writ of attachment is invested with these attributes, because an attachment is a proceeding *in rem*. The process by which the property is openly seized, forming a part of the judicial records of the country, accessible to all, and of which all are bound to take notice, and over which the court has control—all the proceedings from the levy to the final sale of the property having the force and sanctity of judicial records—of the act and judgment of the court itself. They stand in every respect in the attitude and position, and are invested with the character of the judgments of superior courts, and cannot be impeached, nor can these irregularities be enquired into collaterally. 20 Vt., 632; 4 Walls & Serg't, 474; 60, Barr, 272; 1 Brevard, 468; 6 Eng., 519.

The seizure of real estate under attachment operates as notice to the world. 17 Conn., 278; 6 Iredell, 233; 7 How. (Miss.) 658.

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No act of the debtor can in any way affect the title after the levy is made. 17 Conn., 278; 7 Gill & Johns., 421; 4 Dev. & Batt., 388; 8 Ala., 606; 4 How., 579.

No change of possession occurs in attachment of real estate. 13 Mass., 130; 16 Mass., 405. Any one purchasing the property after the levy of an attachment, is a purchaser *pendente lite*, and takes subject to the lien of the attachment, 5 Mon., 86; 6 Eng., 411; 7 Eng., 564-5; 15 Ark., 333-44.

The complainant coming into possession of this land, with notice of the proceeding in attachment, and the levy under it, takes subject to the lien created, and the right and title to be acquired thereby, which extend by relation from the judgment recovered by the creditor, either under this proceeding or the original action to which it is ancillary, back to the levy of the writ of attachment, and takes priority of any claim of his to the property, and this effect and result he is estopped in law to controvert or deny. He purchased in contemplation of law, for the value of the property, less the subsisting debt or incumbrance, which he had a right to discharge. In other words, he was a mortgagor in possession, subject to be sold out if the debt was not paid. Such is the position which the complainant occupies in this case.

R. B. Hilton on same side.

The grounds set up in the bill as those on which the injunction was sought, were various alleged irregularities in the course of the proceedings in the suit of Kemp, first, and Budd, his administrator, afterwards, against Clem. The principles and authorities upon which I rely in this case, are to some extent the same as those cited at the present term in the case of Budd vs. Gamble. Such as the following: In general, a court of equity will not enjoin for want of regularity in the judgment. 10 Gill & Johns, 358; 6 Gill, 391; 11 Wis., 391; 17 Md., 195, 211. In the first of these cases, the principles governing courts of equity, when asked to enjoin proceedings under judgments at law, are laid down in

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the following language: "Courts of Chancery do not lightly interfere with judgments at law. It is only for the prevention of fraud, or to relieve from substantial injury or gross injustice, that its high and extraordinary power of relief by injunction is ever resorted to. It is never exerted merely for the correction of *informalities* or *irregularities* in legal proceedings. He who seeks to avail himself of such defects must prosecute his remedies at law; from a court of equity he can receive no countenance."

In the case above cited, from 17 Md., where the irregularity complained of was taking a judgment of condemnation simply on default, whereas the statute required a writ of inquiry before condemnation, the court say: "Such irregularity will not justify the interference of a court of equity;" nor will a court of chancery interfere even for defect of jurisdiction in the court rendering the judgment. 2 Story E. J., sec. 898. But even were the grounds for the interposition of a court of equity other than those laid down by Judge Story, and the adjudications cited, are the objections to the proceedings against Clem such that Ryal Long could avail himself of them? The settled rule is that the proceedings in an attachment suit cannot be assailed *collaterally*, because either *wrong* or *irregular*. It is enough in such case to show that the court had jurisdiction. Drake on A., 448; 15 Ohio, 435; 1 Ind.

As regards the clerk's authentication of the affidavit, or in other words, his signature to the jurat, we have the affidavit of Thomas Simmons, the clerk, that the oath was actually administered by him, though he failed properly to attest it. Will a court of chancery require more than this? The jurat is not the affidavit. But were there not this testimony of Simmons', which is made a part of the answer, and being responsive to the bill, is therefore valid evidence, even if *ex parte*, the court will presume that the affidavit was made as required by law. 12 Robinson, (La.) 132; 7 Porter, 483; 3 Ala., 709. Even had the affidavit not been signed, that

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would not be a fatal objection to the attachment proceedings. 4 S. & M., 579; 8 Iowa, 310; 6 Fla., 718.

The court will remember that in the case at bar, the issue of the attachment was not the commencement of the action; the attachment was a subsequent proceeding ancillary to the original suit. In such cases we have an express decision by the courts of New York, that the sufficiency of the affidavit is "no longer a jurisdictional question." 13 Barb., 412.

To the other varied and multifarious objections set up and alleged against the proceedings against Clem, I reply in the language of this, the Supreme Court of Florida: "The law having entrusted to the courts the administration of justice, it is always presumed that every tribunal by which a case has been tried, has done what is right, unless the contrary appears upon the record of its proceedings." 11 Fla., 137; 4 How., 161; 1 Brevard, 392.

Under the laws of Florida (Thomp., 368,) the service of the writ of attachment binds the property attached, except against pre-existing liens. And in 9 Fla., 69, the Supreme Court of Florida say: The levy of an attachment creates a perfect lien upon the attached property from the date of the levy. Finally, under the Statute of Uses, (27 Henry, 8,) the title to these lots never was in Branley, and he therefore could not convey to Long.

S. Pasco for Appellee.

When a judgment is taken by default, the plaintiff must see to the regularity of his proceedings. 1 Fla., 378.

The common law suit of Kemp vs. Clem abated by death of plaintiff. There is no record of its revival. This is admitted by Budd in his answer to the bill of complaint, but he attempts to supply this defect by the affidavit of his attorney. Budd also claims in said answer that this said attachment was an auxiliary proceeding in said common law suit. Then it must have abated with it. Even had the original suits stood, the attachment was void. There is no

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proof from the record that the paper filed as an affidavit was ever sworn to. Budd attempted to supply this defect by an *ex parte* affidavit of a former clerk of the court, but failed to get permission to file said affidavit in this cause, and it forms no part of the record proper. He claims that this omission was a mistake. It was a fatal mistake. There is nothing to indicate that this pretended affidavit was connected with this suit, nor in the bond with the papers, that said suit was brought to said Jefferson Circuit Court; nor is there any internal evidence in the bond to indicate its connection with the original suit of Kemp. vs. Clem. No cause of action was filed, nor in the attachment levy was the land levied upon described as said Clem's; nor did the judge sign the minutes of the court at the term when the judgment was rendered.

Budd claims that the defects mentioned in the bill were cured by an appearance, but the record shows no appearance; nor does he allege any, save that the letters J. M. S. were entered upon the docket of the court opposite to the name of said Clem. He interprets J. M. S. as J. M. Smith; but this is no appearance, and if it were, J. M. Smith died before said judgment was rendered, and the record shows, as above, that it was rendered when Clem was neither personally before the court nor represented by his attorney. But these defects were not such as could be cured by appearance, for in taking advantage of a statutory remedy like an attachment, a party must comply with it strictly, the court having only a limited jurisdiction in such cases. 6 Fla., 13. If he did not, must a third party, who has acquired rights by his laches, have them stripped from him? Parol evidence cannot be introduced to supply the missing links in the chain, (Stark. on Ev., 998, 1000, 1020,) and if Budd has failed to comply with the law so as to make his judgment and execution against Clem perfect, then the rights which this defendant has in the meantime acquired cannot be disturbed. If Budd's pretended lien has lapsed for one hour, no subsequent

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action can restore it, for in the meantime the title of Clem to this defendant has been thereby cleared of all its defects, and Clem has no longer any rights of property that Budd can hold subject to his claim; and Budd, in leaving this defendant in undisputed possession of the property for more than three years after the rendition of his judgment, virtually acknowledged this. The garnishment proceedings in connection with this attachment are of such a character as to indicate that Kemp, in his life-time, knew all the details of this bargain and sale by Clem to this defendant, and the conclusion is irresistible that he willingly assented to the substitution of the purchase money for the land itself. While Bradley, as guardian as aforesaid, is arranging the terms of purchase, (October 22, 1863,) the attachment is levied, but "by mistake," as Budd now claims two-thirds of the land is omitted in the levy, and the whole levy is fatally defective, for the coroner fails to describe it as Clem's. Kemp is acting under the advice of a careful attorney, well skilled in legal practice; he sees that he is stripped of his advantage by the neglect of the officer, and he now tries to grasp the purchase money by the process of the court, and to hold it for the satisfaction of his claim, so he makes the usual affidavit that he does not believe that Clem has visible property, upon which a levy can be made, sufficient to satisfy his claim against Clem. He works upon the fears of Bradley, and by service of his writ (October 26, 1863,) manages to stop in the hands of Bradley \$900 of said purchase money in the so-called Confederate currency, then in circulation, and which it seems Clem had sold his land for, and Kemp was willing to receive for his said debt. The arrangement seemed to be for the benefit of all parties; the purchaser's title was confirmed by the substitution of the purchase money for the land, and Kemp recovered the advantage he had lost by the neglect of the coroner. Thus, by an act in which Kemp by his subsequent action acquiesced, the lands were exempted,

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and more money than Kemp claimed in his affidavit as due was held subject to his debt in the hands of Bradley, as stake-holder for both parties; so that, even if all the subsequent proceedings had been regular, the most that Budd could claim would be this purchase money. The record shows, and Budd in his answer admits, that by consent of Kemp the so-called Confederate money was funded in some other securities of a similar character, and that Budd, November 14, 1864, took a judgment for the same, and it was turned over to him, subject to the further order of the court; which further order was intended, of course, to mean the final judgment in the cause, which final judgment was rendered at a later hour the same day. Budd, in his answer, avers that this bond was placed in his individual care, but the court must have given it to him in the same character in which he is named in said suit, and he must have intended at the time to apply it to the satisfaction of said judgment indebtedness. It is the purchase money of the land kept in its present shape by the acts of Budd and his intestate, and it would be inequitable to cause the same lands to be twice subject to the payment of the same debt. Budd acquiesced in said payment for more than three years, but after allowing said so-called Confederate money or bonds to perish in his hands after the failure of the so-called Confederate government, an after-thought suggests an effort to make this defendant's lands liable, not only those that he claims were really levied upon, but also those that were meant to be levied upon. He also levied upon a horse, as Budd admits in his answer, as the property of Clem, but he omits to mention that this horse was sold at sheriff's sale for \$102 28, and that the proceeds thereof were credited upon his judgment, a fact which the record discloses. There was no evidence taken in the court below. It was tried entirely upon the record, the court ruling that no bill, answer or testimony could be received in contradiction or in exemplification of its own records. The following defects were brought to its

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notice, the existence of which was proved by its records: No proof that Kemp ever swore to the truth of his so-called affidavit in attachment. Nothing in the pleadings to connect the pretended attachment proceedings with the suit in which Budd claims his judgment. 15 Wis., 61; 5 Cald., 561. The suit was never revived after the death of Kemp. No cause of action was ever filed. No interlocutory judgment by default was ever taken. The minutes of the term at which the judgment was rendered were never signed by the judge. There is a variance between the judgment and execution.

If these defects are not fatal, then it is urged that by the co-operative action of Kemp the purchase money was substituted in place of the land; that it was placed in the hands of Bradley as stake-holder, to abide the result of the suit; that Kemp by his action elected to take said purchase money rather than the risk of making the land subject to his claim, and that it would be contrary to equity and good conscience, after he has made his election and stood by it for more than four years, to allow him to rescind his action to the detriment of this defendant, when subsequent events make it appear that his election was an unfortunate one, particularly when it is considered that the appellee was at the time of the substitution of said purchase money for the land under guardianship and entitled to the special protection of a court of equity. Acts of 1848, ch. 155.

The court below, after a patient hearing of the cause, made a perpetual injunction enjoining Budd and the sheriff of Jefferson county from all further proceedings under and by virtue of said judgment and execution against said lands belonging to this defendant and mentioned in his bill of complaint, which said judgment is now before this honorable court for examination.

In reply to the special errors assigned, it is urged:

1. There was no appearance, and if there had been, the errors committed by appellant and his intestate are of such a nature that an appearance could not cure them.



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2. The appellant should have conducted his suit regularly and to a valid judgment, in order to be able to subject to his claim the property bought by appellee of Clem while it was pending. If he failed so to do, and if in the meantime by his laches appellee acquired rights which have vested, these rights cannot now be disturbed under any plea of mistake or neglect.

3. There was no refunding of the purchase money, so far as we can judge from the record. The appellant says in his answer, that Bradley procured the money by some means to him unknown. It is evident that the purchase money was stopped in Bradley's hands while the bargain and sale was being completed, and that plaintiff and defendant to the common law suit assented to the arrangement, and made Bradley their stake-holder. Neither do appellee's acts prove rescission of the contract. He went on and perfected his title by recording his deed. But the acts of both parties indicate a substitution by argument between appellant's testator and appellee of the purchase money in place of the land, and this being a favorable bargain for appellee, he being under guardianship at the time it was made, a court of equity will give him the full benefit of his advantage.

4. The entry upon the garnishment to Bradley shows that Clem was willing to pay his indebtedness out of the price of his lands, and indicates a desire to settle the suit rather than to commit fraud.

4. The decree ought not to be reversed in regard to any part of the lands, for the attachment proceedings are void.

6. The appellant has shown no merits in his claim, neither he nor his intestate ever filed a cause of action, and the suit has not been prosecuted to final judgment.

Jurisdiction.—The aid of equity is here invoked against a fraudulent attachment. Appellee could not assert his rights in the court at law, because he was not a party to the cause. Necessity of notice in ancillary attachment; and in many of the cases cited by appellants the party failed, be-

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cause he could not seek relief in equity. 1 Littel, 302; 6 Foster, 506; 1 Stock., 36; 5 Cold., 561; 11 Hump., 542; 4 Sneed, 453; 3 Cold., 140; 2 Head, 598; Tenn. Code, 3455, 3462; 3 Peters' Cond. Rep., 312.

The question in the amended assignment of errors is now for the first time raised, and only shows a defect in the bill, if it shows anything at all.

The question of jurisdiction being raised in this cause for the first time in the appellate court, the appellee respectfully submits the following authorities upon this point, in addition to those hastily cited at the hearing:

"A grantee may enjoin the sale of the premises on execution against the grantor, because such sale, though invalid, would cloud his title." 25 Cal., 337.

"So equity may interfere by injunction in favor of one who owns and has possession of the lands, but upon whose title a cloud rests in consequence of an adverse claim." Quoted in Hill, 348, p. 1; 34 Vt., 484.

"And a statutory remedy, by motion to supersede an execution, does not deprive the chancery court of its original jurisdiction to remove a cloud upon the title to land." Hill. on Injunc., 227, and cases cited thereunder, among them 17 Ga., 249.

"The withdrawal of a claim to real estate does not affect the right of the claimant subsequently to file a bill praying for a perpetual injunction against the levy of executions on such estate." Quoted in Hill, 228, p. 109.

"It is held, in general, that the jurisdiction of equity to enjoin a sale of real estate, is co-extensive with its jurisdiction to set aside and order to be cancelled a deed of the property." 15 Cal., 127.

"So that if a valid judgment at law be iniquitously used, equity will annul what has been improperly done under it." 2 Dev. N. C. Chy., 160.

"So chancery will grant an injunction to prevent a party's

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making use of a legal writ of execution for the purpose of vexation and injustice." 2 Root Conn., 109.

"Or restrain the sale of property illegally taken in execution." All quoted in Hill., 232, p. 123.

"An execution sale may be enjoined where it would cause a cloud on the title of the complainant." 2 R. I., 67; 19 Iowa, 305; 15 Cal., 127.

"And this, although a sale of only the debtor's right, title and wilk." "So, although in fact no title will pass thereby, the property not belonging to the execution defendant." The two last quoted in Hill. on Injunc., 234, p. 126.

In the case cited, (27 Miss., 428,) where an apparently different view is taken, it is where "the sheriff's sale would not pass any title to the purchaser." But where the judgment is apparently regular, and the attachment proceedings are not impeached, it has been frequently held that the sale under execution is valid. And if such sale is valid, the threatened wrong is irreparable. 1 Ind., 296; 6 Vt., 586; 3 Denio N. Y., 167; 3 Wis., 773; 15 Ohio, 435.

It is further held, with reference to conflicting claims upon the property in question, that "where the title of a claimant is clear and unquestionable, chancery will enjoin a sale under an execution against a stranger." Hill. on Injunc., 235, p. 128; 7 Hump. Tenn., 452; Char. R. M., (Ga.) 355.

"Or where the plaintiff has possessed himself of something, by means of which he has obtained an unconscientious advantage." Dan. Chy. Pr., 1728.

"In general, it may be stated that in all cases where, by accident, or mistake, or fraud, or otherwise, a party has an unfair advantage in proceeding in court of law, which must necessarily make that court an instrument of injustice, and it is therefore against conscience that he should use that advantage, a court of equity will interfere and restrain him from using the advantage which he has thus improperly gained." Story's Eq. Juris. 2, 217, p. 885. Similar language

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is used in *Dan. Chy. Pr.*, 1725, where *Jordan vs. Williams* and many other cases are cited.

No person can enjoin a judgment at law to which he is not a party, but if he is aggrieved, he should pray an injunction to the execution. 3 *Ran.*, 501.

In regard to the amended assignment of errors, appellant admits in his answer to the bill of complaint that appellee purchased the land from Clem, as stated in his said bill. In the bill the complainant and appellee alleges that he purchased for a valuable consideration, and if he is mistaken in alleging that he could not have purchased in his own name, he clearly alleges that his money was there invested.

The statutes then in force nowhere prohibit a free person of color from holding property, and such a right is certainly recognized when a penalty is imposed upon those who buy of or sell to without the guardian's consent; but even then the sale or purchase is not declared void. It seems to have required a statute to prevent even slaves from holding property in their own right. *Thomp. Dig.*, 541, p. 107. The rights of free persons of color, as parties to legal action, have been fully recognized by statute and a decision of this court. 3d Session Acts, ch. 155; 5 *Fla.*, 260.

The appellee appears to have fully complied with all the laws. He selected his guardian, and his guardian consented to this purchase. The error assigned is indefinite and uncertain, but if the appellant claims that the title never vested, upon the ground that it was a use limited upon a use, it seems to be fully met in *Bacon's Abridgement*, Article Uses and Trusts, H. 1, "where uses are limited upon uses," and cases there cited. The consideration moving from Long, equity holds Bradley in conscience as a trustee, and the original conveyance is valid. So far as Clem is concerned, he has parted with his estate. The legal estate vesting in Bradley, and the equitable right in Long, a voluntary conveyance from B. could bring the two together in L. as effectually as a bill in chancery. *Bacon's Ab., Uses and Trusts.*

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All circumstances necessary to make a good deed of covenant to stand seized to uses, seems to have been complied with in the transaction between Clem and Bradley. There was sufficient consideration. There was a deed duly executed and recorded. Clem, the grantor, was actually seized of the land conveyed at the time of the grant. There are words sufficient to convey lands.

If the objection is, that the use was executed by the statute, and that under the statute of uses the legal estate passed at once with the possession to Long, and that the estate could not vest because Long was incapable to hold property, the argument fails, because it is based upon a false assumption—Long being in law capable to take the estate, as already shown.

RANDALL, C. J., delivered the opinion of the court.

W. Ryal Long filed his bill in chancery against J. T. Budd, former sheriff, &c., and *ex officio* administrator of the estate of Jackson Kemp, deceased, and Daniel L. Oakley, sheriff of Jefferson county, alleging that on the 25th October, 1863, he purchased for a valuable consideration, through one C. A. Bradley, from one Valentine Clem, a piece of land near Monticello, described as follows: The south half of an acre of land known as the southwest corner of the southwest quarter of section 19, T. 2, R. 5, N. and East, and also the adjoining block on lot on the south side, containing two hundred feet square, on the east side of the northeast corner of the Monticello eighth of land, containing one and a half acres, more or less. That complainant being then a free person of color, the property was purchased in the name of Bradley for the use of complainant, because under the laws of this State the purchase could not be made in his own name; that the deed of conveyance therefor was duly recorded December 14, 1863, and subsequently Bradley released the said property to the complainant. The deed of Valentine Clem to Bradley conveys the property to Bradley,

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his heirs, executors, administrators and assigns, for the use of said Long, his heirs, executors, administrators and assigns; and the deed of Bradley to Long, dated July 31, 1868, recites that whereas, the laws of Florida formerly rendered it unlawful for a free person of color to buy property without the intervention of a guardian, and that Long, while such laws were in force, accumulated property and purchased the lands in question, taking the titles thereto in the name of Bradley, who acted as his guardian, and such laws being no longer in force, and said Bradley having no individual interest in the property, he thereupon released and conveyed the same to Long, together with other property similarly acquired. Copies of these deeds are annexed to the bill as exhibits; that complainant remained in possession of the lands until the 13th November, 1868, when Oakley, sheriff of Jefferson county, levied upon them under an execution issued in favor of Budd, as administrator of Kemp, against Clem, upon a judgment rendered November 14, 1864, for \$932 and costs; that said judgment was void because of sundry irregularities in the record; that after the death of Kemp the suit was not revived; that the administrator claims to have a lien upon the land by virtue of a writ of attachment issued October 22, 1863, in favor of Kemp against Clem, which was returned executed "by levying upon the following property, to-wit: one half acre, being the south half of an acre in S. W. corner of E. 1-2, S.W. 1-4, sec. 19, T. 2, R. 5, N. and E.;" that the attachment is void because there was no affidavit upon which it was issued, the jurat not being signed, and other irregularities and defects; that the judgment ought to be discharged because of certain garnishment proceedings, in which the money of complainant in the hands of Bradley, which was placed in his hands by complainant to purchase the land, was seized, which money was afterwards funded by Bradley, with the consent of Kemp, in Confederate securities, which were ordered by the court to be held by Budd to await the further order of the court, and in the meantime

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these securities became worthless; that the levy under the execution covers one and a half acres, being one more than was levied on by the attachment, and the execution is alleged to be void because it recites a judgment rendered November 15, 1864. Whereas, the judgment, if rendered at all, was rendered on the 14th November, 1864.

And the bill prays that said judgment may be set aside, or that the levy be discharged on account of the illegality of the attachment, or that the judgment may be satisfied to the extent of the amount of the said purchase money paid over to Budd under the order of the court; that complainant's lands may be declared not subject to the judgment and execution, and that the appellant be enjoined from further proceedings under said judgment and execution against his said lands, and for general relief.

The answer of defendant, Budd, after insisting that there is no equity in the bill, admits the purchase of the land from Clem, and the payment therefor by complainant as alleged, but says that the purchase was not made until after the attachment issued in behalf of Kemp had been levied; that the affidavit for the attachment was actually sworn to; that soon after the said purchase, complainant, who had paid Clem the purchase price of the land, was informed of the levy, and that Bradley by some means recovered for complainant a large sum of the same money he had paid Clem for the lands; that the money was funded in four per cent. certificates of the Confederate States by Bradley, by the consent of all the parties in the proceedings; that the court ordered said certificates to be held by said Budd, as sheriff, until the further order of the court, and meantime the same became worthless, and the court has never made further order in the premises; that the suit of Kemp vs. Clem was revived after the death of Kemp in the name of defendant, Budd, *ex officio* administrator; that Clem entered his appearance in the suit in the spring term of 1863 by John M. Smith, his attorney, and also in the fall term, 1864, at which the judg-

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ment was rendered against Clem in favor of defendant as administrator of Kemp; that the attachment was a proceeding in the action ancillary to the original suit, and Clem had personal notice thereof; that the judgment was rendered on the 15th November, 1864; that by virtue of the levy of the attachment upon the property, the judgment was and is a lien upon it; that the judgment has not been paid or satisfied, nor any portion thereof, except costs; that if all the lands purchased by complainant of Clem were not levied on by virtue of the attachment, it was intended that they should be; that Oakley, as sheriff, levied the executions, as alleged, upon the property mentioned in the bill, and he claims that all said property was subject to the lien of said judgment, and the complainant's title, if he had any, was subject to said lien.

The complainant filed a general replication.

On January 28, 1869, a final decree was rendered by the court. The decree recites that the "cause came on for a final hearing upon the bill, answer and other papers filed in said cause."

(It may be remarked here, that a certified copy of the record and proceedings in the suit of Kemp against Clem was brought up by *certiorari*, and was used by the appellee upon the argument; but upon examining that record and the proceedings in this case, we cannot find that that record was used or offered upon the hearing in the Circuit Court, and it is therefore not properly a part of the record in this case. Nor do we see that anything contained in it can affect the decision of this cause.)

The decree was in favor of the complainant, declaring that the judgment was not a lien upon the property, and enjoining all further proceedings under the execution against the property mentioned in the bill, and awarding costs against the defendant, Budd. From this decree the defendant, Budd, appealed.

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The appellant insists that the decree should be reversed, because:

1. The appearance of the attorney of the appellee's vendor in the original action, without exception to the proceedings in ancillary attachment, was a waiver of any irregularities or omissions therein.

2. That appellee was a purchaser *pendente lite*, the land being subject to the lien created by the levy of the writ of attachment, which in this proceeding was notice to the world.

3. That the refunding and acceptance of the purchase money of the land was virtually a rescission of the contract in relation to it, rendering all the land conveyed by the vendor's deed subject to the judgment obtained against him.

4. That the acts and conduct of the vendor and vendee afford at least presumptive evidence of the truth of the alleged fraudulent intention of the vendor, with the cognizance of the vendee, which alone renders that decree erroneous and a proper subject of reversal.

5. That the decree ought to be reversed, so far at least as it enjoins the judgment against that portion of the land levied on under the proceeding in attachment, and binding upon it "except as to pre-existing liens."

6. That the title to the land conveyed by Clem to Bradley for the use of Long, never vested in Long, neither in law nor equity—neither under the statute of uses nor bill in chancery, to execute the trust, if any were created by the deed.

- I. The appellants, in their brief and argument, insist that there is no equity in the bill; that every right the complainant sets up might be available at law, and that where the law affords an ample and complete remedy, equity will not interfere. This position is generally correct, and it is true that the complainant has stated much in his bill which cannot be available to him either at law or in equity.

It is said, however, that it would be difficult to enumerate all the cases in which the remedy by injunction may be ap-

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plied. The extent to which the jurisdiction may be carried is not marked out by any adjusted case, and, in the nature of things, it must forever remain undefined. Willard's Eq., 408. Equity will not interfere to prevent a mere trespass, and the sheriff, in seizing the complainant's property, may be a mere trespasser, and the actual damage may be recovered at law; yet an actual wrongful sale and conveyance of real property, though it may not operate to dispossess the owner, yet brings a cloud upon his title and tends to annoy him, and really affects the value of the property to a greater or less extent, not actually susceptible of measurement or redress in an action at law. It has been held, and, as we think, very properly, that where the real property of one is levied on to satisfy the debt of another, a bill of injunction may be maintained to restrain the sale, notwithstanding he has also remedies at law, and although the sheriff, by reason of his doubts as to the title to the property, takes an indemnifying bond. *Wilson vs. Butler*, 3 Munf., 559; *England vs. Lewis*, 25 Cal., 337.

II. But equity will not enjoin a judgment or execution merely on the ground of errors or irregularities in the proceedings on which the judgment was rendered. *Dana vs. Fish*, 8 Blackford, 407; *Redwine vs. Brown*, 10 Ga., 311; *Reynolds vs. Horriner*, 13 B. Mon., 234; 6 Gill, 391. Authorities to this point are numerous, that a collateral inquiry into the regularity of proceedings before a court of record will not be allowed, except to show an entire absence of jurisdiction, and that a court of chancery cannot be used to correct errors in proceedings at law, and particularly at the instance of third parties. See *Shottenkirk vs. Wheeler*, 3 J. Chy. R., 280; *DeReimer vs. DeCantillon*, 4 id., 92; *French vs. Shotwell*, 6 id., 235.

That there are several irregularities and omissions alleged by the complainant to exist in the record in the suit of Kemp against Clem, may be true, and also, it may be that the sup-

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posed affidavit of Kemp, upon which the ancillary attachment was based, was not sworn to.

These are irregularities which might have been taken advantage of by the defendant in that suit, either by motion or writ of error, but they do not affect the jurisdiction of the court over the person of the defendant, or the subject matter of the suit.

The writ of attachment was doubtless regular on its face, and until it was dismissed or the levy under it vacated, third persons are bound to take notice of the levy.

The summons was duly served on the defendant, Clem, at the suit of Kemp. The suit was subsequently proceeded in and judgment taken by Budd as administrator of Kemp, deceased. The defendant permitted this proceeding without objection, (and certainly no other person could object.) The court was competent to protect itself, and is presumed to have acted upon what was before it, and to have acted correctly, until its proceedings are reversed or set aside.

III. The levy of the attachment was made upon one half acre of the land described in the complainant's bill. The complainant had purchased, and Clem had conveyed to him through Bradley one acre in addition, which the sheriff failed to levy upon under the attachment, but which is now levied upon by virtue of an execution as the property of the defendant, Clem, and it is even claimed that it is bound by the attachment because it "should have been attached," and the omission to attach it was oversight or mistake. There is no charge of fraud in the purchase of the property by the complainant, nor can the doctrine of *lis pendens* be well carried to the extent that a levy of one of the parcels of land by attachment affects any property other than that seized. The lien attached only by the levy, and is limited by the levy. That there may have been a fraud intended to be perpetrated upon creditors by this sale, is granted, but there is no fraud alleged or proved, and it is asking too much to insist that fraud may be implied in a case like this. On the

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contrary, we are impressed that the complainant acted in perfect good faith.

IV. It is insisted by the appellant that because the complainant was a "free person of color," he was, under the laws of this State in 1863, incapable of taking title to the property. Indeed, the complainant considered himself incapable, as he says, of taking the title in himself, and therefore bought and paid for the property, taking title in the name of Bradley, but for his use.

Under the statute of uses, the property conveyed vested immediately on the conveyance being executed in the *cestui que use*, unless the latter was prohibited by some law from taking property. We are not referred to any law of this State which prohibited free persons of color from taking and holding property in their own names, nor are we aware of the existence of any such law. It is true, there was a law requiring free negroes and mulattoes over twelve years of age to select guardians, and the guardian so selected must have been approved by the Judge of Probate, and was empowered to sue for any money due to the negro, and had the same control over such persons as was possessed by guardians in other cases. Act of January 8th, 1848. In 1856, it was enacted that every free negro over twelve years old, who should fail to have a guardian, should be fined and committed to jail until the fine should be paid; and further, that it should not be lawful for any person "to buy of or sell to any free negro or mulatto in this State without the written consent of the guardian," and any person violating this provision was subject to a fine not less than one hundred or more than five hundred dollars.

These acts recognized the right of free persons of color to purchase and own property, to earn money, and to recover it through the courts. It is implied that they could not sue in their own names, but elsewhere it is held by the courts that they may be sued in their proper names without a guardian. *Davis vs. Fitchett*, 5 Fla., 260. Nor does the common law

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prohibit this class of persons holding and covering property. They occupied an inferior rank in the community, and were not generally regarded as citizens, nor as foreigners or aliens, but were inhabitants or subjects. Chancellor Kent says in a note to vol. 2, p. 258, 3 ed., of his Commentaries; "The privilege of voting and the legal capacity for office are not essential to the character of a citizen, for women are citizens without either; and free people of color may enjoy the one, and may acquire, and hold, and devise, and transmit by hereditary descent, real and personal estate," all subject, of course, to such municipal regulations as may be prescribed by the State.

In the conveyance to the complainant, Long, by Bradley, the latter declares that he held the property purchased with the money of Long *as his guardian*. There is no issue in this case as to whether he was properly appointed a guardian under the law of the State, and for aught that appears, Long may have been under twenty-one years of age at the time of the purchase. Certain it is that Long's money paid for the land. It is difficult to find any principle of equity or good conscience which can justify the subjection of property thus conveyed by a free colored person for a valuable consideration, paid by himself in good faith, to the payment of the debts of his grantor, merely because he was such a person.

Is it true that the money earned by a free colored person could purchase nothing? that such money was not a good consideration for a conveyance to him or to his use, or that the conveyance was void? I cannot consent to this, nor do I find a hint toward it in the reported decisions of our courts. The only importance, in my opinion, to be attached to the statutes in question, is that they treat this class of persons as under similar disabilities with infants, and these laws are rather designed for their protection, than to be used as traps and snares for despoiling them.

V. It is insisted that the refunding and acceptance of the purchase money of the land was virtually a rescission of the

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contract, rendering all the land conveyed by the vendor's deed subject to the judgment obtained. But there is nothing in this record showing a refunding to and acceptance of the purchase money to the grantee. The answer alludes to some transaction by which the grantee evidently undertook to save himself from loss, but what was done does not distinctly appear, except that Long saved a part of his money. Certainly it does not appear that the contract was rescinded, but the complainant alleges, and the defendant does not deny, that the grantee paid a valuable consideration for the property; that it was conveyed, and he now holds the property under that conveyance. It may be that the grantee lost nothing by the garnishment proceedings, but it seems that a loss was sustained by *somebody* in that transaction, for something of considerable value was seized under the garnishment, and held at the instance of the plaintiff until it became worthless. And but for this latter fact, the plaintiff would doubtless have realized the greater portion of his judgment of it. The garnishment proceedings, however, have no influence upon the case as stated, or the rights of these parties, whether they were regular or irregular.

This case was presented and argued as upon the bill and answer, there having been no testimony taken, and there is nothing else in the record which we can consider, the exhibits being treated as part of the pleadings. The half of one acre of land, which was seized by virtue of the attachment referred to in the pleadings, was from the time of that levy liable to be levied upon and sold to satisfy the judgment recovered in the suit of Kemp vs. Clem. The other land, described in the bill as having been levied upon by the execution under that judgment, was not subject to such levy, and the complainant is entitled to an injunction restraining its sale.

The decree of the Circuit Court, as to the one half acre of land levied upon by the writ of attachment, is reserved; and as to the residue, the decree is affirmed. Each party to pay one-half the costs incurred upon this appeal.

Scarlett vs. Hicks and Lang—Syllabus.

**FRANCIS D. SCARLETT, TRUSTEE OF FANNIE A. PARLAND,
APPELLANT, VS. WILLIAM M. HICKS, ADMINISTRATOR,
AND MARGARET LANG, ADMINISTRATRIX OF ROBERT
LANG, DECEASED, APPELLEES.**

1. Where there has been a suggestion of insolvency filed in the County Court, and notice calling in creditors, one creditor has an equity to enjoin proceedings under a judgment at law obtained by another creditor, after suggestion of insolvency filed in the County Court.
2. In such a case, the County Court, not having the power to enjoin execution of a judgment at law rendered by the Circuit Court, a Court of Chancery may grant relief by injunction without removing the administration of the assets to its own jurisdiction.
3. To such a proceeding the legal representative of the decedent is a necessary party. The omission to make him a party is not, however, a ground for the dissolution of the injunction. To such a proceeding the sheriff—the officer of the court of law—is not a proper party, having no interest in the subject matter of the controversy. His being made a party improperly is, however, no ground for the dissolution of the injunction.
4. An injunction continues, under the practice in this State, for the time fixed by the order granting it, and if no time is limited, until the hearing, unless it is sooner dissolved. There are no terms of the court for chancery proceedings. The court, under the statute, is always open for such proceedings, whether interlocutory or final.
5. That the chancellor, before granting an injunction, has failed to require an exhibit of a claim alleged to be in writing, or in this case an exhibit of a copy of the claim filed in the County Court, and a copy of the proceedings in that court, is no ground for a dissolution of the injunction.
6. To dissolve an injunction where the only relief to be obtained is a perpetual injunction staying proceedings at law, is equivalent to dismissing the bill. In such a case as this, where there is abundant equity in the bill, where some of the defendants are non-residents, and where a subpoena has been issued and served upon one of the defendants in person, and upon the attorney of the non-resident defendants, the injunction should not be dissolved upon the ground of delay in prosecuting the suit.
7. That a party procures the entry of his appearance with the statement that his appearance is special, does not alter the effect of the appearance.

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If he contests the suit upon its merits. If, notwithstanding this entry, he contests the suit upon its merits in the court below, obtaining a judgment in his favor, and upon an appeal to this court contests the appeal upon its merits, he is in court for all purposes, and upon remanding the case will be held to file his defences in the regular order of pleading.

Appeal from an interlocutory order of the Circuit Court for Alachua county.

George W. Means, administrator of John W. Anderson, filed in the Probate Court of Alachua county a suggestion of insolvency of said estate. A decree of insolvency was made, and all the creditors were cited to file their claims against said estate. Francis D. Scarlett, the appellant, and Hicks and Lang, administrators, appellees, were creditors of the estate in amounts exceeding \$40,000 each. Appellant promptly filed claim according to the citation, while appellees sued their claim, obtaining a judgment. They caused execution to issue, a levy to be made upon property of the estate, and advertised the same for sale. Appellant filed his bill setting up these facts, praying that the sale might be enjoined and the respondents remitted to the Probate Court. The injunction was granted, issued and served upon the sheriff and the respondents' attorneys in the common law suit, and returned on the 11th of August, 1870. Subpoena was served on the sheriff and respondents' attorneys, and returned "not found," as to respondents themselves. On the 12th of August, 1870, respondents' attorneys, "appearing specially," moved to dissolve the injunction on the following grounds:

1. There is no equity in the bill. Equity will not permit one creditor to sue another standing on equal rights against the debtor.
2. The whole matter of complaint is entirely within the jurisdiction of the Probate Court.
3. The demand is barred by the statute of limitations.
4. George W. Means, the administrator of Anderson, who is not made a party, is a necessary party.
5. There is an entire misjoinder of parties.

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6. There has been no process served on the parties to the judgment and execution enjoined.

7. No bond has been given to secure the creditors in the judgment at law, as the statute requires.

After hearing, an interlocutory order was made, dissolving the injunction. From this order this appeal is prosecuted, and a reversal of the order is sought upon the ground that the court erred in dissolving the injunction upon any of the grounds set forth.

C. P. Crawford for Appellant.

The subpoena was the proper process, (see Code, secs. 383, 390, 391, 78, and Stat. of Anne,) was served in proper time, (5 Paige, 85,) and on the proper parties, to-wit: the record-attorneys of non-resident defendants. 1 Green's Chy., 5; 4 Wash. C. C., 472; 3 Bro. C. C., 429; 18 Ves., 447; 1 P. Williams, 523; Hill. on Injunc., 50; 5 Sim., 416; 1 Dan. Chy. Pr., 363.

Defects of service are waived by voluntary appearance of defendants, in fact. Code, sec. 90; 7 How. Pr., R., 51; 9 id., 378, 448; 12 id., —; 15 id.

There is ample equity in the bill, for the probate's decree of insolvency subjects the assets to the equitable rule of distribution among creditors, forbids the race of legal diligence among creditors, and annuls all liens arising after the insolvent's death. Act of 1853, p. 106; 2 Williams on Ex., 1718, 1628; 1 Smith's Chy. Pr., 610; 2 Rich. Chy., 32; 4 Johns. Chy., 637 to 645, 651; 8 How., U. S., 111; 12 Fla., 166; 2 Wheat., U. S., 424.

The bill charges "irreparable damage" and "fraud" on the act of 1853, raising equities so potent that the injunction would not be dissolved, even "on answer" denying every allegation of the bill. 3 Sumner, 70; 8 Ire. Eq., 9; 2 Jones' Eq., 318; 7 How., U. S., 627; 12 Ga., 5; 2 Johns. Chy., 204; 22 Ga., 275; Watk. Chy., 90; Hill. on Injunc., 93.

Parties.—Any creditor of an insolvent estate may sue for

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injunction to restrain other creditors from legal proceedings. Act of 1853, p. 106; Hill., 335; 4 Johns., 643; 3 J. J. Mar., 294; 1 Md. Dec., 466; 2 Williams' Ex.; 2 Wheaton, 424.

Misjoinder of parties defendant is not a ground for dissolution of injunction.

Injunction bond is not required in this suit, because complainant is not a party to the execution enjoined. Thomp. Dig., 454; 12 Tex., 202; 8 Paige, 29; Hill., 129. Complainant acts in a fiduciary capacity. 2 Ran., 247; 3 Bland, 606. The bill charges fraud. 6 Paige, 108. The facts disclosed show that the injunction should be perpetual. 5 Gill, 138. The injunction is necessary to protect the jurisdiction. 2 Williams' Ex., 1628; 1 Camp. N. P., 148; 2 Rich. Chy., 32; 4 Johns. Chy., 643, 651; 8 B. Mon., 334; pt. 1, 2 vol. Eq. Lead. Cases, 218.

Even if the bond is defective, it is not a ground for dissolving an injunction. 6 Fla., 347.

J. B. Dawkins and O. A. Myers for Respondents.

There is no equity in the bill. It does not charge fraud, accident, mistake, or other matter relievable in equity. 12 Fla., 106, 107; 15 Ga., 554; 12 Grat., 40; 2 Texas, 57. It seeks no remedy against the representative of the estate, who is a necessary party. 1 Curt., 309; Thomp. Dig., 453; Code, sec. 10.

This judgment at law cannot be remedied by a court of equity. Hill. on Injunc., par. 6, 49, 75. The whole subject matter is entirely within the jurisdiction of the County Court, which court has exclusive jurisdiction of this case.

The administrator of the insolvent estate is the only person who has an equity, if there is any at all.

Each of the parties to this bill are creditors of the estate, and one creditor cannot enjoin another creditor from pursuing his legal remedies against one who is their common debtor. 2 Ire. Eq., 129; 4 Johns. Chy., 651; 3 Dan. 186;

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Adams' Eq., 25, 74, 259; 1 Story's Eq., p. 549; 2 Story's Eq., p. 890. The sheriff is an improper party. An injunction will be dissolved at the return term of process, if complainant has taken no steps to have process served without an answer of the defendant, although he has appeared by attorney. 4 Wash. C. C., 174; Hill on Injunc., 102, 48, 50; 3 Ire. Chy., Rule of U. S. C.; Code, sec. 333, p. 6.

There is no bond. The bill seeks to enjoin a judgment at law, and the provisions of the statute requiring bond are peremptory. Thomp. Dig., 454.

WESTCOTT, J., delivered the opinion of the court.

This bill is brought by one creditor of an insolvent estate against the sheriff and another creditor of the same estate, who, since the filing of the suggestion of insolvency in the County Court, and the publication of notice calling the creditors to that jurisdiction, has obtained a judgment at law; has caused a *fi. fa.* to issue, and is proceeding under the process at law to subject the assets to sale to satisfy his judgment. In accordance with the prayer of the bill, an injunction was granted. Subsequently, upon the motion of the defendants, this injunction is dissolved, and from the order dissolving the injunction this appeal is prosecuted by the plaintiffs. Whether this order ought to be sustained is, therefore, the question for our consideration. The grounds upon which it is sought to be justified are numerous, involving many questions of practice, as well as various matters connected with the very interesting subject of the administration of the assets of insolvent estates.

The first ground upon which it is contended that the injunction was properly dissolved, is, that there is no equity in the bill—one creditor of an insolvent decedent having no right to enjoin execution of a judgment at law obtained by another creditor after suggestion of insolvency filed in the County Court and notice calling the creditors. Where the estate is solvent, it is true that one simple contract

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creditor has no equity to enjoin proceedings at law by another creditor against the legal representative of the decedent. It is apparent, however, that authorities to this effect do not settle the question here involved. Creditors, under the circumstances of this case, occupy under the statute a relation to each other analogous to that which they occupy after a decree to account upon a general creditor's bill. In such a case, each creditor is entitled to appear before the master, and may there contest the claim of any other creditor. 1 Craig & Phillips, 48, 56. He goes to the master's office with an equity which enables him to become an actor, even as against his co-plaintiff in the same bill, so far at least as he desired to contest there his claim or debt.

Under the provisions of the statute regulating the administration of insolvent estates in this State, upon the filing of the written suggestion of insolvency in the County Court, all the creditors are called into that jurisdiction for a final settlement of the estate, in accordance with the provisions of the act fixing the priorities and standing of the respective creditors or claimants. Under the provisions of this statute, each creditor or claimant has a right to contest the claim or demand of any other claimant or creditor, although the debt is admitted by the administrator. So we see that, after suggestion of insolvency is filed, the creditor having filed his claim in the County Court, becomes invested with the right to contest the claim of any other creditor, and this is true, even if the legal representative of the decedent admits it.

In this case the debt, as against the administrator, has been established by a suit at law, nor does the creditor deny that the debt is a valid claim against the estate. His proposition is, that upon the filing of the suggestion of insolvency and notice by the County Court, no creditor can proceed at law further than to establish a disputed claim by a judgment at law, and that if upon the rendition of such judgment the court of law awards a *fi. fa.*, or the creditor obtains a *fi. fa.*, it is void, being contrary to and fraud upon the statute,

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which provides that upon the rendition of a judgment, "the same shall be filed with the County Court for *pro rata* payment." He insists that he is entitled to the process of a court of equity to enjoin proceedings by this judgment creditor, which are contrary to the statute. It is clear that the effect of this judgment is only to establish the debt as against the legal representative. It constitutes no lien upon the real estate of the decedent, and the claim is entitled to no priority by virtue of the fact that it has passed into judgment. After a decree upon a general creditor's bill, not only the executor but a creditor, or even a legatee, could upon motion alone enjoin proceedings at law upon another creditor. 4 Eng. Chy., 123; 1 Jac., 123. Under these circumstances, a court of equity, having custody of the assets, would enforce the rule of equity in their administration, and would prevent the acquisition of liens at law.

The legal rule for the administration of these assets is the rule of equity, and the court of law would, upon proceedings by the defendant in the judgment at law, prevent the issuing of an execution, and if issued, would direct its return. The creditor not being a party to the judgment, the court of law cannot give him relief. He must seek a court of equity, where equity will follow the rule of law, which is equity, and will administer the necessary relief. Having this right under the express terms of the statute, and being vested with such equities as are stated above, the only question remaining to be considered to dispose of this branch of the subject is, does the fact that the assets are in the County Court, to be there administered by that court, prevent the chancellor from enjoining the judgment at law? We think not. The County Court cannot enjoin a judgment of the Circuit Court, and in the absence of this power in the County Court, we can see no reason why the chancellor may not enjoin these proceedings without taking the administration of the assets into his own jurisdiction. Under the organization of the judicial system of the State of North Carolina, the

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Superior Court, in the matter of the administration of the assets of decedents, occupied in many respects to its Probate Court the same relations as the Circuit Court in our system does to the County Court. Speaking of the jurisdiction of these two courts, the Supreme Court of North Carolina, in a recent case, remarked: "It may, in the course of proceedings in the Probate Court, become necessary, in order to protect the rights of one party or the other, to have an injunction, which the Probate Court cannot order. In that case, the party must of necessity apply to the Superior Court, but such an application would not oust the jurisdiction of the Court of Probate." 64 N. C., 177. So in this case the Circuit Court had jurisdiction to grant the injunction without removing the administration of the assets to its jurisdiction, or if the plaintiff had so desired, we do not see why a court of chancery could not, upon a general creditor's bill, have taken the administration of the assets into its own jurisdiction. This question, however, is not involved here. Our conclusion, therefore, is, that this creditor has an equity which entitled him to this relief, and as it could not be granted by the County Court, the Circuit Court properly administered it.

The next ground upon which it is sought to sustain the order dissolving the injunction in this case is, that the rules of chancery practice in the Circuit Court of the United States are the rules controlling the practice in the Circuit Court in this State; that these rules provide that when an injunction is awarded in vacation, it shall, unless previously dissolved, continue until the next term of the court, or until it is dissolved by some order of the court, and that as a term intervened in this case, and no order was made continuing the injunction, it stood dissolved. Even if it is admitted that this rule fixes the next term of the court as a limit for the continuance of the injunction—as to which we express no opinion—it is not in force in this State, as under the provisions of our statute (ch. 521, sec. 6,) there are no terms of

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the court for the purpose of chancery proceedings. An injunction continues under our practice for the time fixed by the order granting it, and if no time is fixed, until the hearing, unless it is sooner dissolved.

It is again urged that the injunction was properly dissolved for the want of the bond, which the statute requires before an injunction staying proceedings at law should be issued. The statutes upon this subject (Thomp. Dig., 454, and ch. 526, sec. 1, p. 104, Acts of 1852,) provide that no injunction shall issue to stay proceedings at law after verdict, unless the party applying therefor shall previously pay all the costs in the suit at law, and shall enter into a bond with two or more securities in double the amount of the verdict at law, payable to the plaintiff in the action at law, conditioned to pay the debt and interest enjoined, and such damages as may be occasioned by the wrongful issuing of the injunction.

The intention of the Legislature here was to require at the hands of the defendant at law due security for a compliance with the result of the suit at law before he could question it in a court of chancery. Having failed in the suit at law, he must give security for a compliance therewith in case he fails to secure the aid of a court of equity. The present case, while it may be within the letter, is not within the reason or spirit of the statute, nor is it within the evil which the statute was enacted to remedy or the intention of the makers. Under these circumstances, the rules of construction require that it should not be extended to this case. Plow., 18; 8 Paige, 31; Bacon's Ab., Title Statute, p. 385; 12 Fla., 611.

The next ground that we consider is, that the claim of the creditor being in writing, its statement in the bill was not sufficiently explicit; that no exhibits showing the nature of the claim or the proceedings in the County Court accompanied the bill. If it is admitted that the claim in this case is evidenced by writing, which does not appear, the failure to

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submit the written evidence with the bill does not justify a dissolution of the injunction. The chancellor, before awarding the injunction in this case, might and should have required an exhibit of a copy of the claim filed by the creditor in the County Court, as well as a copy of the proceedings in that court, (12 Md., 315;) but an injunction having been granted, a failure in this respect is no ground to dissolve it. While a chancellor may very properly require such evidence to satisfy his own conscience before granting the injunction, it by no means follows that a failure so to do will justify a vacation of the order made without it.

It is also urged that the plaintiff failed in this case to use due diligence in the prosecution of his suit, in neglecting to cause a subpoena to issue until a considerable period had elapsed after filing the bill and after issuing the injunction.

There is a degree of laches in the prosecution of a suit after obtaining injunction, which will justify the dissolution of the injunction. From the record in this case, it appears that the subpoena was issued before the motion to dissolve was made, and it also appears that the defendants not served were not to be found in the county, and that the subpoena was served upon the attorney of the plaintiffs in the action at law. The legitimate presumption from this record is, that the defendants not served reside beyond the limits of the State, and that really the subpoena could not be served upon them.

In this case, the plaintiff believed that the service upon the attorney of the plaintiff in the action on the common law side of the court was sufficient, and without deciding whether such service was or was not sufficient in a case of this kind, where a person not a party to the judgment at law seeks an injunction, it is apparent that the delay was not occasioned by wilful negligence. In the language of the Supreme Court of the United States, in a case where this question was raised, (2 Dall., 360,) "we cannot decide that the delay which has occurred was not without reasonable excuse; no evidence of

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wilful delay in the prosecution has appeared, and it is to be considered that if the injunction is dissolved, the court put it out of their power to do effectual justice."

In some of the States (2 Stock. N. J., 331,) where the rule is that a subpoena must be taken out with the injunction and made returnable within the time prescribed by the rule for the return of the service of the injunction, a failure to take out the subpoena at the time required by the rule is sufficient ground upon which to dissolve the injunction. There is no such rule in this State, and there is consequently no result of this character attending a failure to comply with it.

No answer has been filed in this case. The motion to dissolve is principally based upon the ground that there is no equity in the bill. Under such circumstances, where the equity of the bill is abundant, and there is great necessity for the interference of the chancellor to protect a clear right of the party, the injunction should not be dissolved unless there is gross negligence in the prosecution of the suit to final decree. The circumstance that the defendants are non-residents, is always to be considered, as well as the fact that the subpoena was issued before the motion was made. 5 Paige, 85. It is also insisted that the sheriff was improperly made a party to this cause. This is true. He has no interest whatever in the controversy. Upon the issuing of the injunction it would have been sufficient to have served him with a copy of it, or other sufficient notice. It would have been a contempt for him to have proceeded after he had notice of it. Officers of the court who have no interest in the subject matter of the suit, should not be put to the expense of appearing and answering. 4 Ire., 474; 10 Ohio, 268. This, however, is not a ground for a dissolution of the injunction.

We have thus disposed of the grounds urged by the appellants, which, in their judgment, justified the order of the court. Some questions discussed, not arising upon the record, are not considered.

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It is to be remarked in this case, that the provisions of the act entitled an act to enlarge and define the jurisdiction and to establish certain rules of practice in the courts of equity in this State, approved February 14, 1861, escaped the attention of the court, as well as of all the parties. The first section of this act requires that "in all suits in equity" in this State, where summary process of injunction is prayed, the injunction shall not be granted without bond, except upon certain affidavits and evidence, &c. The chancellor in this case erred in granting the injunction without bond, in the absence of the affidavit and evidence required by the statute. This, however, is not good ground for the absolute dissolution of the injunction. In respect to this, as well as to many other matters connected with the merits of the case as disclosed in the bill, which are urged as grounds for a dissolution of the injunction in this case, we quote with approval the language of Mr. Justice Baltzell, in the case of Gamble vs. Campbell, 6 Fla., 347. He says: "An injunction should not be absolutely dissolved for deficient injunction bond, for non-payment of costs, or for want of notice. The plastic and salutary power of the court of equity is exerted to amend and correct, rather than by adopting harsh and severe rules to dismiss and turn the parties out of court." In this case, as the only relief sought is to stay the proceedings at law, and the only final decree to be granted is a perpetual injunction, a dissolution would be equivalent to dismissing the bill. Had the injunction in this case been granted in conformity with the statute, then the code which changes the rule could not have affected this order; but as the order granting the injunction was originally wrong, and is now to be modified, the rule applicable to such a case is the rule prescribed by the code. Par. 3, sec. 383. This is a motion to vacate or modify a previous order made by the court, and is controlled by the code. The court will require, in this case, a compliance with section 171 of the code within a reasonable time to be fixed by its order, and upon

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a failure so to comply, may direct a dissolution of the injunction. We would remark, that this is a case in which it is proper to require "a written undertaking without sureties."

The defendant in the action at law is the legal representative of the decedent, whose effects are the occasion of this proceeding. He is a necessary party to this suit, and the court below will retain the injunction, with leave to the plaintiff to make him a party.

All of the proceedings of the attorneys of the defendants in the court below in this court have followed what they have called a special appearance. It is immaterial by what word they may describe their appearance. They appeared and contested the merits of the bill in the court below. They have appeared and urged the case upon its merits here, and we must hold, in conformity with the authorities, that the defendants are in court for all purposes.

When this case is remanded, it will be the duty of the defendants to make their defence in the regular order of pleading.

The order of the court, dissolving the injunction in this case, is reversed and set aside, and the case is remanded for such proceedings as are in accordance with this opinion and the principles of equity.

Keen, et al. vs. Jordan—Argument of Counsel.

WILLIAM R. KEEN, ELIAS E. JOHNSON AND WILLIAM J. BARNETT, APPELLANTS, vs. DAVID JORDAN, ADMINISTRATOR, &C., APPELLEE.

1. When a bill in chancery, in the prayer for process, does not contain the names of the defendants against whom process of subpoena is prayed, as required by Rule 22, (Chancery Rules,) it is demurrable, it being a defect in the frame of the bill.
2. When a demurrer to a bill is filed without being accompanied by certificate of counsel as required by the 31st Chancery Rule, advantage of the omission should be taken by motion to strike off the demurrer; but if the parties proceed to a hearing without regarding the omission, and the questions raised by demurrer are passed upon by the court, it is too late, upon appeal, to raise the objection.
3. A bill in chancery was filed, praying that the record of a judgment at law and an execution thereon, which had been destroyed by fire, might be re-established or supplied by copies thereof, and that a copy of the execution might be placed in the hands of the sheriff in lieu of the one destroyed: *Held*,
4. On demurrer to the bill, that the power to supply a new record when the original has been lost or destroyed, pertains to the court in which the record was made, and is an inherent power in courts of general jurisdiction; and a court of equity has no jurisdiction to supply or establish the record of a court of law which has been lost or destroyed.

The case is fully stated in the opinion of the court.

Bryson & King for Appellants.

The bill should contain a prayer for process against all the parties, and none are parties unless they are specially named in the prayer, unless there is some other special prayer in the bill, and they are specially named in the same. 1 Dan. Chy., p. 392, note 3; 23 Eq. Rule, Index, p. 206; Story's Eq. Pl., 44, note 3.

There is a clear and complete remedy at law, and where this is the case, a court of equity will not entertain jurisdiction, unless it is clearly and distinctly given by an act of the Legislature. 1 Story's Eq. Juris., 64, 65, 67; Story's

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Eq. Pl., 472; 17 How., 130; 5 Fla., 350; 5 Pet., 495, 503.

Is there a clear complete remedy at law in this case? The statutes provide a remedy. *Thomp. Dig.*, 36-61-64; Act of 1862, p. 47; Act of 1866, p. 33; *ib.*, 24.

But it may be contended, as it was in the court below, that the act of 1862, secs. 9 and 12, gives the court of chancery jurisdiction. Section 9 provides that when any documents, papers or instruments of writing pertaining to proceedings and matters pending and undetermined in any court in this State, shall be lost, mislaid or destroyed, all such papers, documents and instruments of writing may be established in the manner prescribed by law in reference to lost papers, or in the manner pointed out in this act, or in such manner as the court specially shall direct.

It is contended that this, if it can have any meaning, means some legal and known manner, and that it does not give the court of chancery any new jurisdiction, nor can it be so construed that a judge of the Circuit Court, sitting as a judge at common law, can give a court of chancery such jurisdiction to re-establish a record of the Circuit Court at law.

It cannot be contended that these proceedings are in accordance with the 5th section of this act, for it clearly means the court in which the judgment or decree was rendered, and none of the requirements of that section have been complied with. But it may be contended that this is, in some other manner, especially pointed out as the court shall direct.

It is contended that the court of chancery, under the 5th section, might re-establish a decree or record of its own, but it would be a monstrous proposition to say that it had authority to re-establish a record of a court of common law, and especially so where the proceedings are as defective as they are here. See *præcipe*, *Summons* and *Judgment*.

It may be contended, however, that the 12th section, as it was in the court below, gives the necessary power. This

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certainly did not give the court of chancery any power it did not have previous to the passage of the act. Then the inquiry must be, what powers did the court have to re-establish lost papers or records?

The court of chancery certainly has power to relieve in certain cases of lost papers, but if there is any case where a court of chancery has re-established a record of a court of law, the counsel have failed to show it, but they simply content themselves by saying that it was so plain a proposition that the objection had never been made, but we do not think that *dictum* will satisfy this court. And the nearest we have been able to find any authority going in that direction, is in the case of Laurance vs. Laurance, 42 N. H., 109, and this in a case of mortgage for personal support, in which the court had original jurisdiction, and then it is put upon the ground that the deed was not recorded. 42 N. H., 109; 1 Story's Eq. Jurist., 81, notes 7 and 84; 1 Dan. Chy. Pr., 576, 651.

The next nearest case we have been able to find is, in Lord Mansfield's time, the court of chancery was asked to rebuild a mill-dam, which was refused with this simple remark, that the court would turn them over to a court of law, which could try it, with directions to have the same tried. 3 Atk., p. 905.

The practice, so far as we understand it, is to set up papers or compel persons to carry out a contract by making a conveyance which they had agreed to make, or to enjoin parties from proceeding upon illegal papers.

But to re-execute papers, or make record of courts of law, there is no such precedent, that we have been able to find. The nearest is the isolated case of 42 N. H., 109, and the authority there cited. There certainly is no such authority for any such jurisdiction in the common elementary books. 1 Story's Eq. Pl., p. 80 to 90; 1 Dan. Chy. Pr., 576, 657.

The court will not understand us to say that the court of

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chancery cannot relieve in cases of lost records, but we do say that where there is as plain and specific a remedy at law as there is here, a court of chancery cannot entertain jurisdiction; that a court of chancery cannot re-establish a whole record in a court of common law. And the present case shows the fallacy of such a thing, if it could be done. Here the proceedings are defective; præcipe is defective; the summons is defective, and will have to be amended. Well, now, how is this to be done? A court of chancery makes a decree that the record shall be re-established, and then goes on to decree that the same shall be the record in the case. The defendant comes into court and shows the præcipe and summons, and that, agreeable to the summons, he has satisfied the judgment against him, and that he paid the sheriff upon the execution fifty dollars, the amount summons was for; but the judgment asked to be rendered upon the record is for \$147. The plaintiff wants execution for the balance of the money. Is this court going to establish this judgment, and order an execution to issue? Why not follow the statute of the State, (which is so plain that it cannot be misunderstand,) to re-establish lost papers? Why go into chancery? There must be some reason, where there is so little authority for one, and the other is so clear.

It is certain that the objection is so clear, upon the first point, that it must be sustained, or the 23rd Rule means nothing.

But the case which is most similar to this, and which clearly shows that this court intends that a court of chancery shall not have jurisdiction where there is a remedy at law, is the case in 8 Fla., of *Robinson & Roulhac vs. Yon and others*. 8 Fla., 350.

J. J. Finley for Appellee.

1. It is urged, in behalf of the appellee, that the demurrer in this case was properly overruled by the chancellor in the court below, because said demurrer was not accompanied by

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the certificate of counsel that in his opinion it is well founded in law, as required by the 31st Rule of Chancery Practice. Index to Fla. Rep., 208.

2. It is also contended that the filing of the demurrer was a waiver of process and service, and that it cured the irregularity, (*if irregularity it be,*) in not setting out the names of the defendants in the prayer for process.

3. Before the passage of the acts of the Legislature conferring upon the courts of law jurisdiction to re-establish lost or destroyed papers or records, it cannot be doubted that courts of chancery had and exercised such jurisdiction, and it is submitted that none of these acts of the Legislature take away or destroy this jurisdiction in courts of chancery.

4. It is a settled principle that when a court of chancery is clothed with jurisdiction, and a like jurisdiction is conferred on a court of law by an act of the Legislature, it will not have the effect to disturb or destroy such chancery jurisdiction, unless such act of the Legislature shall, in clear and express terms, take it away.

RANDALL, C. J., delivered the opinion of the Court.

The appellee filed a bill in chancery in the Circuit Court of Columbia county, praying that the record of a judgment recovered at law against the appellants in the Circuit Court of that county, and an execution issued thereon, which had been destroyed by fire, might be re-established or supplied by copies thereof, and that a copy of the execution might be placed in the hands of the Sheriff in lieu of the original.

The bill alleges, that in April, 1866, the complainant "instituted an action of debt against William R. Keen, Elias E. Johnson and William J. Barnett," &c. The prayer for process is as follows: "Your orator prays that the usual process may issue to the *said defendants* according to the rules and practice of this honorable court." The bill is signed by a solicitor but not by counsel.

The appellants demurred to the bill on the ground—1st.

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That they are not proper parties to the bill; and 2d. That the complainant has not stated a case entitling him to relief in this court, for that he had a full and perfect remedy at law. The demurrer is signed by solicitors, but has no certificate of counsel that "it is well founded in point of law."

The record states, that the "cause coming on to be heard *upon the demurrer* of the defendants to the complainant's bill, and the court having heard the arguments of counsel for both parties therein, it is ordered, and adjudged, and decreed, that the demurrer be and the same is hereby overruled." From the order overruling the demurrer, the defendants appealed.

I. The appellants call attention to the fact, that the prayer for process of subpoena does not contain the names of these defendants, or of any other persons, and that therefore the bill is demurrable.

Rule 23 requires that "the prayer for process of subpoena in the bill shall contain the names of all the defendants named in the introductory part of the bill."

An omission of the names of the defendants against whom process of subpoena is prayed, is a defect in the frame or form of the bill, which may be taken advantage of by demurrer. Story's Eq. Pl., §527, 528, 642; Mitford's Eq. Pl., 113. This bill is clearly liable to this objection, as the names of the persons intended to be made defendants in chancery are not named as such, either in the introductory part or in the prayer for process.

The appellee however suggests in his brief, that the demurrer was properly overruled, because it was not accompanied by the certificate of counsel, that in his opinion it is well founded in law, as required by the 31st Rule of Chancery Practice. This objection of the appellee relates to an irregularity of which he should have taken advantage by motion to strike off the demurrer. Upon an appeal, parties cannot take advantage of any irregularity which they have either consented to or waived. 1 Barb., Chy. Pr., 396. Here

the parties proceeded to argument and judgment upon the demurrer, thus waiving this irregularity. The demurrer was *overruled* by the court, not struck off or disregarded. Where a defendant is guilty of an irregularity in filing a demurrer, the plaintiff may, on application, obtain an order to take the demurrer off the files, but not that the demurrer be overruled. 1 Dan. Chy. Pr., 617-18.

If the point may be made at this stage, the defendants might also insist that the complainant's bill (which is not signed by counsel) be struck off the files. In *Gove vs. Pettis*, 4 Sand. Chy. R., it was held that a demurrer could not be taken for an omission of the signature of counsel or solicitor to a bill, but that it was a fit subject for a motion to take the bill from the files; and in *French vs. Deer*, 5 Vesey, 547, where a bill was demurred to for other causes, the Lord Chancellor abruptly refused to examine the bill, because it was not signed by counsel, and ordered it struck off, and the plaintiff to pay costs. *Daniell's Chy. Pr.*, 588, and *Barb. Chy. Pr.*, I, 44, say, however, that the want of signature of counsel to the bill is ground of demurrer. Either practice seems to be tolerated. The application to strike off the demurrer should have been made to the court below, where the irregularity might have been cured by the parties.

II. The second ground of demurrer is, that the plaintiff is not entitled to relief upon the case stated in the bill, and the question presented is: Has a court of chancery jurisdiction to supply to another court a record of the latter in place of one which has been destroyed by accident? The jurisdiction of the court of chancery, arising from accident, is a very old head of equity, and perhaps coeval with its existence. But every case of accident will not justify the interposition of a court of equity. The jurisdiction will be maintained only—first, when a court of law cannot give suitable relief, and secondly, when the party has a conscientious title to relief. Both grounds must concur in the given case, for

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otherwise a court of equity not only may but is bound to withhold its aid. 1 Story's Eq. Jur., 79.

Is there then not merely some remedy, but is there adequate remedy at law? The Legislature, in cases like this, has provided a method of supplying records which have been destroyed or lost; but in such cases, if the court of chancery ever had jurisdiction, the legislative provision of a remedy will not take away the jurisdiction of equity, unless by express prohibition, (Case vs. Fishlack, 10 B. Mon., 40,) for otherwise, a court of law might oust a jurisdiction rightfully attached in equity.

The jurisdiction of the court of chancery in the case of lost instruments, as bonds, deeds, &c., was founded upon the doctrine that there could be no remedy, because there could be no *profert* of the instrument, without which a declaration would be fatally defective. And there was another ground for the interference of a court of equity, and that is, that no other court could furnish the same remedy with the fit limitations which might be demanded for the purposes of justice, by granting relief only upon the party's giving a bond of indemnity; a court of law being incompetent to require such a bond as a part of its judgment. 1 Story's Eq. Jur., 82. On the latter ground also, courts of equity had jurisdiction of remedies upon negotiable instruments which were lost or destroyed, for a court of law required that the plaintiff suing upon negotiable paper should produce it at the trial, which he could not do if it were lost. Willard's Eq. Jur., 52; Story's Eq. Jur., §85.

In coming into equity upon a lost bond or covenant on negotiable instruments, the party must have some object beyond the mere decree of the existence and loss of the paper; he must be entitled to some relief or protection from the court beyond the establishment of the instrument. In the case of a lost bond or note, he may have a decree for its enforcement and satisfaction. If a deed concerning land is lost, and the party prays discovery and to be established in

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possession under it, equity will relieve, for there is no remedy at law; and where the plaintiff is out of possession, there are cases in which equity will interfere upon lost or suppressed title deeds, and decree possession to the plaintiff; but in all such cases there must be other equities calling for the action of the court. 1 Ves., 434-35; 3 Atk., 132; 1 Fonblanque's Eq., B. 1, ch. 1, sec. 3; id., ch. 3., sec. 3. These citations sufficiently indicate the grounds of equity jurisdiction in the cases of lost or destroyed papers, without farther illustration.

The power of supplying a new record when the original has been lost or destroyed, is one which pertains to courts of record of general jurisdiction, independent of legislation. It is an inherent power in such courts, and has been acted upon in this State in *Rhodes vs. Mosely*, 6 Fla., 12. and in *Pearce vs. Thackeray*, decided at Jan'y Term, 1870. In *Douglass vs. Yallop*, 2 Burrow, 722, a new judgment roll, for a judgment rendered thirty years previous to a motion to supply the loss, was ordered to be made. In *Jackson vs. Smith*, 1 Caines, 496. a new *nisi prius* record was allowed to be made up on motion and affidavit that the original had been lost or burnt, after six years. In *White vs. Lovejoy*, 3 Johns., 448 a *fi. fa.* on which a levy had been made was burnt, and the court ordered a new *fi. fa.* to be substituted. The power has been long and frequently exercised in Alabama. *McLendon vs. Jones*, 8 Ala., 298; *Doswell vs. Stewart*, 11 Ala., 629; *Dozier vs. Joyce*, 8 Porter, 303; *Williams vs. Powell*, 9 Porter, 493; *Wilkinson vs. Brandam*, 5 Ala., 608; *Lyon vs. Bolling*, 14 Ala., 753; *Bishop vs. Hampton*, 19 Ala., 792; 3 Ph. on Ev., 1,066.

Upon the destruction of any part of a record or of the process, pleadings, or orders in a suit, the loss may be supplied by making up others in their stead, provided the court be reasonably satisfied that the proposed substitute is of the same tenor. Upon that, the court where the suit is must exercise its own judgment. *Harris, et al. vs. McRae's adm'r.*, 4 Iredell, 81.

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The proceedings, in all the cases cited, were had in the absence of any statutory regulation, upon the acknowledged and necessary power of the court to control, amend, and supply its own records.

The jurisdiction invoked by the complainant in the present case has not been exercised by any court of chancery in this country or in England, (so far as we have been able to discover with our limited means of examination,) and the principles upon which the court takes jurisdiction in the cases of lost instruments, come far short of embracing this case. The inherent power of the courts to control their own records, and to supply losses therein, it seems is antagonistic to the power of any other court to interfere and make records for them. By this proceeding, one court of special jurisdiction is invoked to take cognizance of and to supply to another court of general jurisdiction a record, in lieu of one which has been destroyed. This power, once admitted, will place the records of the courts of common law at the mercy of the court of chancery, and might lead to an absurd conflict between the law and equity side of the court over the records of the court of common law: one party imploring the conscience of the one to seize the power of the other and control the history of its past action, and perhaps to compel the court of law to adopt and acknowledge as a fact a thing of which it may deny any knowledge, and against which action the other party may justly ask it to revolt and treat as an usurpation, because its own power is ample and adequate.

There is nothing here requiring the exercise of the conscience of the court which may not be attained by a simple proceeding according to the course of the common law, and therefore chancery has no office to perform.

The decree of the court overruling the demurrer must be reversed upon both grounds of demurrer.

Swepson et al. vs. Call and Baker—Syllabus.

GEORGE W. SWEPSON, F. DIBBLE, THE TALLAHASSEE
RAILROAD COMPANY, *et al.*, APPELLANTS, VS. WILKINSON
CALL AND JAMES M. BAKER, APPELLEES.

1. When a judge of the Circuit Court orders the transfer of a cause to another circuit, under the provisions of "An act to provide for the more effectual administration of justice in this State," approved January 24, 1861, he should affirmatively state in the order of transfer, or in some other paper to be filed, the reason why the transfer is made, or the order will be irregular.
2. The statute referred to makes it a condition of the transmission of the papers by the clerk, that the costs shall be first paid, and if the condition be not complied with on the part of the party procuring the order of transfer, and the clerk should refuse or neglect to transmit the papers for that reason, any other party may, on proper application, have the first order revoked and the cause removed to any proper circuit on complying with the statute.
3. A judge has no jurisdiction of a cause in which he is interested, and can make no order therein except for the purpose of transferring it to some other circuit whereof the judge is qualified to try the cause, and if the judge of the circuit to which the cause is sent is also disqualified, *held*, that it is his duty to order the papers to be returned to the court from which it was sent, in order that some other circuit may be selected.
4. The jurisdiction of the court in which a suit is commenced is not divested merely by an order of transfer under the act of January 24, 1861, nor does the court to which the transfer is directed to be made obtain jurisdiction until the papers reach the clerk of the court mentioned in the order.
5. A civil cause is not pending in a court until the papers showing the existence of the cause are deposited with the clerk who has the custody of the records of the court having jurisdiction of the cause.
6. The requirements of a statute authorizing a transfer of a cause from one court to another must be strictly observed, and everything necessary to transfer jurisdiction under the statute must appear in the record of the cause.
7. The fourth section of the act approved January 24, 1861, authorizing a judge of one circuit to make orders in suits pending in another circuit in vacation, when the judge of the latter circuit is under the disabilities mentioned in the act, is not in conflict with the constitution of 1860.

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The order made by the judge of another circuit is *pro hac vice*, the order of the court in which the cause is pending, and such order must be filed therein.

8. An order of a circuit judge in a cause supposed to be pending in another circuit is void, unless the cause is pending therein at the time the order is made.
9. When application is made to a judge for a writ of injunction upon bill filed, the judge should make an order requiring security to be given to protect parties who may sustain damages in consequence of the issuing of the injunction, and when, under the law of 1880, the party applying for the injunction makes affidavit that he is unable to give the required security, and that the statements in the bill are true, the judge is not authorized to grant the writ without requiring security, unless the party shall prove, *ex parte*, the truth of the statements of the bill and of the accompanying affidavit.
10. The general rule is, that an application for a writ of injunction, or for the appointment of a receiver, must be upon notice to the opposing parties; yet, if the act to be prohibited be such that delay will be productive of serious damage, the writ will be granted or a receiver appointed *ex parte*. The emergency must be judged of by the chancellor in the exercise of a discreet judgment.
11. When a suit in chancery is commenced in the second circuit, and an order is irregularly made transferring the cause to the third circuit, and owing to the absence of the judge of the latter circuit the papers are taken to and filed in a county in the fourth circuit, where proceedings are had in the cause, from which proceedings an appeal is taken, this court will reverse and set aside such proceedings, and direct that the papers be returned to the county where the suit was commenced.

Appeal from the Circuit Court for Duval county.

The case is fully stated in the opinion of the court.

Papy & Peeler for Appellants.

S. J. Douglas on same side.

The bill in this case was filed on the equity side of the Circuit Court of Leon county, Second Judicial Circuit of Florida.

On the application of the complainants, Baker and Call, for an injunction against the defendant, the judge of the Second Judicial Circuit, feeling himself interested in the

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matter in controversy, and therefore disqualified from hearing and determining the application, upon the petition of the complainants, made an order transferring the cause to the Circuit Court of Columbia county, Third Judicial Circuit. By the first section of the act "to provide for the more effectual administration of justice in the courts of this State," approved January 24, 1851, the judge of the Circuit Court in which a cause may be pending, if he is disqualified from hearing and determining the same, shall, upon the petition of either party, cause the same to be removed to some court in the next nearest circuit; but if the judge in the next nearest circuit be also disqualified, some other circuit shall be selected for that purpose. The third section of the same act provides "that upon the removal of a cause, it shall be the duty of the clerk of the court in which such cause was pending to transmit all papers in his office belonging thereto to the clerk of the court to which said cause may be ordered to be transferred, together with the order of transfer."

From the provisions of the act above recited, it will be seen that four things are necessary to the complete transfer of a cause from one circuit to another: First, the disqualification of the judge of the circuit in which it is pending to hear and determine the same; second, a petition, either of the plaintiff or defendant, to have the cause removed to some other circuit in which the judge is not disqualified; third, that the judge in which the cause is pending shall make an order removing the same; and, fourth, that the clerk of the court in which the cause is pending shall transmit all papers in his office belonging thereto to the clerk of the court to which the cause may be ordered to be transferred, together with a certificate of the order of transfer. All these requirements of the statute must be complied with, in order to give jurisdiction to the court to which the cause is transferred.

It is admitted that in this case the judge of the court in

which the cause was pending was disqualified from hearing and determining the same; that a petition was filed by the complainants for the removal of the cause, as directed by the statute; that the order was made by the judge of the Second Judicial Circuit for the transfer of the cause to Columbia county, Third Judicial Circuit.

But it is denied that the clerk of Leon Circuit Court, where the cause was pending, ever transmitted the papers in the cause, together with the order of transfer, to the clerk of Columbia county. The certificate of the clerk of Leon Circuit Court abundantly proves this. Until this act was performed, the Circuit Court of Leon county was not divested of its jurisdiction, nor did the judge of Columbia county acquire jurisdiction to hear and determine the cause.

It is contended by appellees that, inasmuch as one of the appellees got possession of the papers, from the clerk of Leon Circuit Court, and delivered them to the judge of Columbia Circuit Court, that the statute had been substantially complied with, and that the cause stood transferred and was pending in Columbia Circuit Court.

To this we answer, that the statute makes it the duty of the clerk of the court in which the case is pending to transmit the papers, together with the order of transfer, to the clerk of the court to which the cause is removed, and no such power or authority is vested in either of the parties, plaintiffs or defendants. It is the duty of the clerk of the court to which a cause is transferred to file the papers, docket the cause, and to make an entry of record of the order of transfer.

This is the only means by which the Judge of the court can properly know that the cause is *then* pending in his court, and subject to his jurisdiction, and that it is rightfully there. A cause is not pending in the court to which it is ordered to be transferred until the receipt of the papers by the clerk together with the copy of the order of transfer. This order of transfer is his warrant for taking custody of

the papers sent him by the clerk of the court where the suit was pending previous to the transfer. The Judge of the circuit to which the transfer is made can have no proper legal information that such a cause has been transferred to his circuit until he gets it from the clerk of his court, who has possession of the papers and the order of transfer. He can only legally get possession of the papers by and through his clerk; neither of the parties can put him in possession of them, for they have no right to their custody.

It is argued by appellees, that the order made by the Judge of the Second Judicial Circuit for transferring this cause to the Circuit Court of Columbia county, operated as an immediate transfer of the cause to that circuit; and that from the time of making the order, the cause stood transferred; and that the jurisdiction could not be in abeyance; and the case of *Ammon vs. The State*, 9 Fla., 531, is relied on to support the position. In that case the accused applied for a change of venue, which was granted, and the order made and entered of record, sending the cause to an adjoining county, and *then* the court *adjourned* for the term. The Supreme Court of the State, in passing upon this case say, "that the court having *adjourned*, the jurisdiction could not be in abeyance, and had vested in the court to which the venue had been charged." It would have been strange if they had decided otherwise. The court having adjourned its term, the record and order making the change of venue was beyond its reach, and at no subsequent term could they alter or change it. Not so, however, with orders made at chambers and in vacation. Until the order is executed it is within the control of the Judge making it. Until executed it is in *feri*, and subject to be recalled, altered or amended at the will of the Judge making it.

Jurisdiction is the right to hear and determine a cause, and is either general or limited.

If the right to hear and determine a cause is given by statute, and a mode and manner pointed out by the statute

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by which the cause is to be brought before the court, the jurisdiction of the court in such cases will be special and limited, and nothing will be presumed in favor of the jurisdiction, even when exercised by a court of general jurisdiction. 6 Wheat., 119; 3 Cond. Rep. S. C., 33. The mode and manner prescribed by a statute giving jurisdiction for its exercise, where none existed before the passage of the statute, the terms and conditions of the statute must be strictly followed, otherwise the court will have no jurisdiction, as nothing will be intended in favor of such jurisdiction, even by a court of general jurisdiction.

It has been held by the Supreme Court of the United States, in the case of Thatcher et al. vs. Fowell et al., lessee, 6 Wheat., 119, that in summary proceedings, when a court exercises an extraordinary power under a special statute prescribing its course, that course ought to be exactly observed, and those facts, especially which give jurisdiction, ought to appear, in order to show that its proceedings are *coram judice*.

In the case now under consideration, it was necessary, in order to give the Circuit Court of Columbia county jurisdiction, that the papers in the cause, and the order of transfer, should have been transmitted by the Clerk of Leon Circuit Court to the Clerk of Columbia Circuit Court. It was the only way pointed out and recognized by law for these papers to get to the Circuit Court of Columbia county, be there filed, and become a cause pending in that court.

Without the passage of the act of the 24th January, 1851, the cause could not be transferred from the one circuit to another; any such transfer would have been totally void. The act alone gives the power of transfer; and to give jurisdiction, the court exercising it, must show affirmatively that every act required by the statute has been observed and performed. It is this alone which can give the court jurisdiction.

The order of transfer was from the 2d to the 3d Judicial

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Circuit, and the injunction and order for a receiver was made by the Judge of the 4th Judicial Circuit, in which circuit there was also filed an amended bill.

It would be difficult to conjecture how the cause got in Duval Circuit Court, 4th Judicial Circuit, and upon what principles the Judge of that circuit entertained jurisdiction.

Admitting it to be true, as stated in argument, that the Judge of the 3d Judicial Circuit, to which the cause was ordered to be transferred, was also disqualified to hear and determine the cause, this fact did not confer upon the complainants the right to transfer it again to another circuit. There was no order made by the Judge of the 3d Judicial Circuit transferring the cause to the 4th Judicial Circuit; and if he had made such order it would have been illegal and void—first, because he had as before shown never obtained jurisdiction of the cause; and secondly, because if the cause had been properly transferred to his circuit, and was pending in his court, it was his duty, under the 1st sec. of the act of 1851, to remove the cause to the circuit from which it had been transferred, that the Judge of the circuit might order it to be transferred to some other circuit, the original transfer being void because of the disqualification of the Judge of the circuit to which it was transferred.

The bill of complainants is one for discovery and relief. Upon this bill, before answer and without notice to the defendant, the court granted an injunction and made an order appointing a receiver to take possession of the railroads. This was error, which should be corrected by this court by dissolving the injunction and vacating the order appointing the receiver.

J. M. Baker for Appellees.

It is admitted by counsel for defendant that the order for a transfer of the cause was regularly obtained from Judge White, to transfer the cause from Leon to Columbia county, under the 1st section of the act of January 24, 1851, p. 125.

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It is not denied that the papers were lawfully taken from the file of Leon county, and went before his honor, Judge White, and that on examining the case, Judge White declining to act, made the proper order to transfer the papers to Columbia.

It further appears from the papers, that the Clerk of Leon county acknowledges the payment of costs, and made and forwarded a certified copy of the order of transfer as required by statute.

It is objected that the Clerk of Leon did not send the bill to the Clerk of Columbia county, and could not do so because the complainants did not return the bill to his office, and he was not able to forward it to the Clerk of Columbia county.

The statute does not prescribe the mode of sending papers to the clerks of circuit courts to which a cause may be transferred. The 3d section of the act makes it the duty of the clerk "on removal of a cause to send all papers in his office." &c., showing that the order removes the cause, not the forwarding of papers by the clerk.

The order of Judge White removed the cause from Leon county, 2d circuit, *eo instanti*; the jurisdiction of the court ceased and determined, and rested in the circuit court of Columbia county; it could not be held in abeyance. *Ammon vs. State*, 9 Fla. 330.

It has been contended that the ruling in that case does not apply, because there the court adjourned and could not make any order, and jurisdiction could not be held in abeyance.

In this case the same reasoning will apply; hence the judge having made the order admitting his interests, his jurisdiction and authority over the case ceased, because by law he could have made no other legal or valid order in the case.

The mode of transfer of papers given in statute is merely directory to the clerk, and requires of him the performance of a duty to secure a certain end; the intention of the law

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is complied with when the papers are transferred or carried before the proper court. They are directed usually to the clerk, not to give jurisdiction of the case but for convenience and safe keeping of the papers.

A refiling of the papers in the court to where they are transferred is not necessary—is not required by any statute law, and has not been usual in the practice of this State: only one formal filing is required. 9 Fla. 250.

It was not necessary under the statute to file the papers in Columbia county. The papers in this case were transferred by the presumed assent of the Clerk of Leon county, through one of the complainants. This is shown by the certificate of clerk, of copy of order of Judge White, together with other papers filed with him, sent to care of complainants, and his excuse for not sending them sooner.

The affidavit of complainants shows that having the papers in their possession, thus by assent of the Clerk of Leon county, they applied to Hon. A. A. Knight, Judge of the 4th circuit court, to hear the said cause on the ground that Hon. T. T. Long, Judge of the 3d circuit, was absent from the State. Thus Judge Knight took jurisdiction of said cause under the 4th section of the act, Jan. 24, 1851, p. 124.

That such act was intended for relief in such cases, as shown by its very title, "An Act to provide for the more speedy administration of justice;" that section authorizing the judge in such cases, on the application of any party, to hear and determine such motions as may be submitted to him, and may discharge said duties in his own or any other circuit, and shall be substituted in all respects in place of judge disqualified.

Under this act, the Judge may perform the duties in his circuit. If he does so, he must take full jurisdiction of the case. If he goes out of his circuit, when he decides the papers are properly before him, he takes *general jurisdiction* of the cause, and is substituted in all respects, even as to

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jurisdiction, in place of the judge disqualified, and the papers are then fully and properly before his court.

The jurisdiction of circuit court judges is general; the limits provided in fixing different circuits are from convenience and economy, intended to aid and facilitate justice, not to retard and defeat it; therefore, laws fixing such limits, as well as those authorising transfers of causes, should be liberally construed to promote speedy trials and hearings and secure relief.

It is urged that if the case was pending in Columbia county, there was no order of transfer to Duval. The judge being absent, no order could be obtained, and under the 4th section no order is required to authorize a judge to act for one absent or disqualified. The application of one of the parties, "of any party," as in this case was done, is sufficient to authorize the judge to act and assume jurisdiction. The papers being in possession of the complainants and they finding the judge absent, it was not necessary to file the papers in Columbia county, which might cause difficulty or delay. They were authorized to make application to Judge Knight under provision of section 4 of said act for relief; they could have presented the case before Judge Long, if present, without formally filing the papers.

The objections made to the jurisdiction are purely technical, and involve questions of form, and not of substance. The spirit and interest of the law have been fully complied with, and surely, the courts of the State will not be used to defeat great interests and rights, *when no question of merit is involved or raised*, merely on a formal technicality. *De minimis lex non curat.*

The question of jurisdiction cannot be raised by new motions as in this case. The defence that another court of equity has jurisdiction, should be taken by demurrer if the cause appears on the face of the bill, or by plea, if it does not. Story's Eq. Pl'dg, 488; Daniel's Chan'y, 578. The judge of the 4th judicial circuit as soon as the papers were

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filed in his court, had original jurisdiction of the cause, because the bill shows that most of the defendants reside in that circuit. The property not being within his jurisdiction, is no bar to proceedings in equity; the court of equity acts upon the person when within its jurisdiction.

The papers in this case are regularly filed by the Clerk of Duval Circuit Court—the amendment of bill was a right of course. It does not appear that any copy had been taken of the bill, and no evidence of appearance or answer. The case could not have been heard by Judge Long, (being absent.) There was no authority to return them to Leon county, as the judge of that court had lost all control of the case. Jurisdiction had gone from him; the case was therefore, either properly brought before Judge Knight under section 4 of said act, or in absence of any one qualified to try the case, Judge Knight had a right to assume original jurisdiction.

WESCOTT, J., being disqualified, did not sit in the cause.

RANDALL, C. J., delivered the opinion of the court.

On the 11th day of August, 1869, James M. Baker and Wilkinson Call filed their bill in chancery in the Circuit Court for Leon county, Second Circuit, against Calvin B. Dibble, George W. Swepson, Franklin Dibble, M. S. Littlefield, J. P. Sanderson, Edward M. Cheney, Alonzo Huling, John L. ReQua, Silas L. Niblack, The Tallahassee Railroad Company, The Jacksonville, Pensacola & Mobile Railroad Company, and Harrison Reed, Governor, &c., defendants, upon which the process of subpoena was issued and returned not served.

On the 27th day of August complainants presented to the Judge of the Second Circuit their petition, stating that, "having by motion applied to your honor to grant the injunction prayed for in said bill, and your honor having refused to entertain or hear said motion on the ground of

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interest, being disqualified in the provisions of statute," and thereupon pray that an order be made transferring said cause for hearing to the county of Columbia, in the Third Judicial Circuit; which petition was signed by the complainants. On the same day the following order was made:

"Petition having been filed by the complainants in the above stated cause for a transfer of the above stated cause from this circuit on the ground that the presiding judge of this court is disqualified on account of interest in the subject of litigation in said cause, and cannot legally hear and determine the same, it is therefore ordered that the said cause be transferred in accordance with prayer of said petition to the county of Columbia, Third Judicial Circuit, to be heard and determined before the judge of that circuit. It is further ordered, that the clerk of Leon Circuit Court be required to forward papers in said cause to the clerk of Circuit Court for Columbia county, together with a certified copy of this order.

"Ordered at Chambers this 27th day of August, 1869.

"P. W. WHITE, Judge," &c.

On the 18th September the complainants presented to the Hon. A. A. Knight, Judge of the Fourth Circuit, a petition, stating that the Hon. T. T. Long, Judge of the Third Circuit, was then, and had been for several days, absent from the State, and asking that the Judge of the Fourth Circuit take the said cause under consideration, and to grant such orders or decrees as to him should be deemed proper.

The bill of complaint was filed in the office of the clerk of the Circuit Court of Duval county, together with other papers, (which had been filed with the clerk of Leon county,) on the 20th September, and on the next day an amendment to the bill of complaint was filed in the Duval clerk's office, wherein the complainants pray the immediate appointment of a receiver. On the 20th September, also, the complainants filed their affidavit that they were "unable to give a bond for a sufficient amount to cover the value of the property in

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litigation, or for the amount of the receipts and earnings of the Pensacola and Georgia, and St. Marks, and Florida, Atlantic and Gulf Central Railroad Companies."

On the 21st September, the judge allowed an injunction as prayed in the bill, (which was issued out of the Circuit Court of Duval county,) and made an order appointing a receiver, and directing him to take possession of the Pensacola and Georgia Railroad and the Tallahassee Railroad and their properties, rights, credits, effects, trains, engines, equipments, receipts and money, and directing him to continue running the trains on said roads, and *applying the net earnings* of the said P. and G. R. R. to the extension of said road to the Chattahoochee river, &c., which said order was filed in the clerk's office of Duval county, and the receiver subsequently filed his bond in said clerk's office and took possession of said railroads.

It does not appear that the papers in said cause were transmitted to the clerk of the Circuit Court of Columbia county, or that the judge of the Third Circuit ever made any order in the cause. The defendants in the suit have appealed from the above mentioned orders of the judge of the Fourth Circuit allowing an injunction and appointing a receiver, upon the following grounds:

1. Because the Hon. A. A. Knight had no authority or jurisdiction to take cognizance of said cause, or to grant said interlocutory decrees and orders, or either of them.
2. Because the order appointing a receiver in said cause was made *ex parte* and without notice.
3. Because said order appointing a receiver was not warranted by any of the rules or principles of law or equity.
4. Because there is no equity in the bill of complaint to warrant the said interlocutory decrees and orders, or either of them.
5. Because the record and files in said cause were never ordered to be transferred to the jurisdiction of the said

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Judge Knight or to the Circuit Court of the Fourth Judicial Circuit, or to said judicial circuit.

6. Because the files and papers in said cause have never been properly transferred to the Hon. T. T. Long, Judge of the Columbia Circuit Court, Third Judicial Circuit, and were never filed in said court or in said circuit, and said cause was never pending therein.

7. Because the said interlocutory decrees and orders granting an injunction and appointing a receiver work a great wrong and injury to the defendants, and were not necessary for the protection of any of the alleged rights of complainants, as set forth in said bill of complaint.

The statute under which the application was made for the order to transfer the cause from the second to the third circuit is found in the laws of 1850, chapter 373, being "An act to provide for the more effectual administration of justice in the courts of this State." It provides (section 1) "that whenever any cause may be pending in any of the Circuit Courts of this State, and the same cannot be heard, tried or determined by reason of the disqualification of the judge of such court to hear and determine the same, it shall be lawful for either party therein to present his petition to such judge, praying that said cause be transferred to some other Circuit Court, and it shall be the duty of the judge so disqualified to have said cause removed to some court in the next nearest circuit; but if the judge in the nearest circuit be also disqualified, some other circuit shall be selected for that purpose."

Section 3 provides "that on the removal of a cause by virtue of this act, it shall be the duty of the clerk of the court in which the cause was pending to transmit all papers in his office belonging thereto to the clerk of the court to which said cause may be ordered to be transferred, together with a certificate of the order of transfer, *provided* the party applying for the transfer shall first pay all costs which have accrued in such cause."

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From these provisions of law, it is manifestly necessary, in order that a cause may be transferred to another circuit on account of the interest of the judge before whom a cause is pending, that it shall appear, first, that the cause pending cannot be heard on account of the disqualification of the judge; second, that a petition be presented, praying for a transfer; third, that the judges so disqualified shall order the cause to be removed to the "next nearest" circuit in which the judge thereof is not disqualified. It is then the duty of the clerk to transmit all the papers belonging to the cause to the clerk of the court mentioned in the order of transfer, with a certificate of that order, "*provided* the party applying shall first pay all the costs which have accrued in the cause."

Does it appear in this record that the judge of the Second Circuit was disqualified, and that a proper foundation was laid for making the order of transfer? The only reference to this fact is contained in the petition, which recites that the petitioners had applied to him for an injunction, and that he "had refused to entertain the motion on the ground of interest, being disqualified under the statute." The petition does not show that the judge was interested, nor does the judge certify or admit that he was interested or disqualified, nor does it appear that the judge had refused to entertain the motion on that ground, except as it is so recited in the petition.

We should not be disposed to enter upon this criticism, except as the matter is affected by another circumstance, to-wit: the statement in the petition that an application had been made to the judge of the Second Circuit to grant an injunction, which application he had refused to grant for the reasons stated in the petition. The clerk, as we have seen, was directed to transmit *all* the papers in the cause to the clerk of Columbia Circuit Court, and it is stated in a certificate of the clerk among the files in the case, and was admitted in the argument, that he had not so forwarded the

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papers, but that one of the complainants had taken all the papers in the case, giving his receipt for the same, and that afterwards he had received by express a petition and order of transfer, which he filed and sent copies thereof to one of said complainants, and that the papers had not been returned to the clerk's office. We have no means of knowing, therefore, that *all the papers* which had been filed in the Leon clerk's office are copied into the record before us, which record is certified to us by the clerk of the Duval Circuit Court. It is probable that the evidence of the refusal of the judge to grant an injunction has been mislaid. It is apparent that the papers had not been kept together, as we notice that the exhibits referred to as constituting a part of the bill of complaint, an affidavit of one of the complainants, and the certified copy of the order of transfer, were not filed with the bill in the Duval clerk's office until three days after the allowance of the injunction and appointment of the receiver, and four days after the filing of the bill. As we have thus no means of ascertaining from the record whether the judge refused to act for the reasons alleged in the petition, we are obliged to resort to a presumption of the fact, in order to sustain the order of transfer, and to conclude that it did not find its way to the Duval clerk's office with the other papers in the case.

If it were proper to presume the existence of jurisdictional facts, we should conclude that some evidence of the action of the judge in refusing to grant the injunction was somewhere in existence. But if there was no such order, suggestion, admission, or other tangible evidence of the alleged interest of the judge, we must hold that the record, which ought to show everything necessary to sustain the jurisdiction, did not show affirmatively (as we think it should) that the judge was disqualified, and therefore authorized to order the transfer to be made. But we do not think it necessary to determine as to the regularity of the proceedings which were had in the Fourth Circuit upon this ground. It is noticed

for the purpose of calling attention to the irregularity, and in order that it may be rectified.

Assuming, then, that the order of transfer was regular, it was the duty of the clerk of the Circuit Court of Leon county, "provided the party applying for the transfer first pay all costs," to transmit all the papers to the clerk of the Circuit Court of Columbia county, with a certificate of the order of transfer. The mode of transmitting the papers is not specified. It was suggested that it was not proper to send them by a party to the suit. We do not see, however, why a party interested in the safe conveyance of the papers may not be entrusted with them for that purpose, or how any injury could accrue thereby to the other party in a case like the present.

It is contended that the jurisdiction of the cause remains in the Circuit Court of Leon county, because the clerk has never transmitted the papers to the clerk of Columbia county pursuant to the order. On the other hand, it is insisted that when the order was made and filed the jurisdiction of the judge granting the order ceased, except for the purpose of enforcing obedience to it.

We think the jurisdiction of the *judge over the cause* ceases whenever it appears, or whenever the fact exists, that he is interested in it and that he can "entertain no motion in the cause (other than to have it tried by a competent tribunal,)" and the Legislature has declared that all orders, decrees and judgments made or entered by such judge, except as stated, shall be null and void. Laws of 1862, p. 13.

When the disqualified judge orders the cause to be "removed", the cause still remains pending in the same county until the removal is *effected*. The law directs the clerk to transmit the record and papers upon condition that the costs be first paid; and this contemplates that the record remains *in statu quo*, until the condition is complied with.

Again, the latter clause of section 1 of the act of 1850, heretofore quoted, says: "But if the judge of the nearest

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circuit be also disqualified, some other circuit shall be selected." If the papers be transmitted to a circuit in which the judge is also interested, the latter judge cannot take jurisdiction, and he can only direct the return of the papers in order that "some other circuit shall be selected." We are clear that this is the proper interpretation, and it follows that the jurisdiction does not depart from the *court* in which the suit was commenced until the cause is "removed" *to* some circuit in which the judge is qualified to try it.

It also follows that the court named in the order of transfer cannot take the jurisdiction and hear, try and determine a cause until the removal is effected, and this does not occur until "the cause," to-wit: the record, pleadings and papers, find a lodgment in the proper clerk's office in the proper circuit. The theory that the jurisdiction of a cause always exists somewhere, and is never in abeyance, is certainly correct, and yet the jurisdiction of the Circuit Court over a cause may be perfect, while the power of the parties and of the judge may be in abeyance by reason of the disqualification of the judge, until the proper steps are effectively taken and the cause removed *to* some circuit whereof the judge is qualified to hear it.

The judge cannot know that a cause is pending in any county in his circuit except by the evidence of the clerk's endorsement upon the papers. Judgments and decrees can never be entered until after the filing of the pleadings with the clerk. We know of no mode of ascertaining whether a suit is pending anywhere, except by inspecting the records of papers in the proper clerk's office. In the pursuit of such an inquiry, if we find no papers or record in the office showing the existence of a suit, and the clerk informs us that he knows of no such cause, it would be idle to tell us that a suit is *pending* in that county. In a case like the present, how is the judge to know that a cause has been removed to his circuit, unless the certificate of the order of transfer appears in the record? and how can he know that such an

order has been made unless he finds it in the proper office? The order of transfer directs, and the law requires, that all the papers be transmitted "*to the clerk* of the court to which said cause may be ordered to be transferred, together with a certificate of the order of transfer." It seems to us that the law requires that the papers be delivered into the possession of the clerk before the case is "transferred to" the proper court. If a party petition for a transfer of a cause and procure the entry of the proper order, and then neglect or refuse to "pay all costs" as required by the law referred to, thus suspending all proceedings in that court, the clerk cannot be compelled to transmit the papers. Can it be said, in such case, that any other court has become possessed of the cause, with the power to hear and determine it? or that, even if the costs have been paid, the court to which it may have been ordered to be sent has any power to compel the clerk to transmit the papers or to control the papers or records which have never been so transmitted to its custody? The law in the case points out certain steps to be taken in order to effect a change of the jurisdiction from one circuit to another. Without the statute, there would be no power which the law could recognize to transfer the jurisdiction and confer it upon another court, and until the law is complied with in all essential particulars, the jurisdiction is not affected. We are, therefore, unable to conclude that this cause has been "removed to" the Circuit Court of Columbia county, or that the judge of the Third Circuit has had any control over the cause, and that the cause is yet properly pending in the Leon Circuit Court. If the pre-requisites entitling the party to a removal are not complied with, the judge of the Second Circuit may, on the proper application, revoke the order already made, and make another order to remove the cause to a proper circuit.

This conclusion is not in conflict with the decision in the case of *Ammons vs. The State*, 9 Fla., 530, that case depending upon another and different statute.

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But whether the cause was pending in the Second or in the Third Circuit, had the judge of the Fourth Circuit any power or authority to entertain any application and make any order in the cause under the act of January 24, 1851? The appellants contend that he had not, and this involves the inquiry, whether that act is in force under the constitution of 1868, or is abrogated by it?

The fourth section of the act before quoted provides that "whenever the judge of a Circuit Court shall be unable, from absence, sickness, or other cause, or shall be disqualified from interest, or any other cause, to discharge any duty whatever pertaining to his office which may be required to be performed *in vacation*, it shall be the duty of any other circuit judge, on the application of any party, to perform such duties," &c.

The constitution, article vi., section 7, provides for the appointment of a judge for each circuit, who shall hold terms in each county in his circuit, and upon the order of the Chief Justice, may hold *terms* in any other circuit. Section 8 provides that the Circuit Courts in the several circuits shall have original jurisdiction in cases in equity, and the judges thereof shall have power to issue all writs necessary to the complete exercise of their jurisdiction.

It is urged, with much force and plausibility, that under the constitution the circuit judges can do not act when out of their own circuits, or exercise any judicial power affecting causes pending in another circuit, except under the order of the Chief Justice. We must hold, however, that the provisions of the constitution should not be so construed as to prevent the furtherance of justice. Because the constitution does not provide for a change of venue, but does provide for the trial of causes in which a judgment may be interested by a transfer of one judge to the circuit of another judge, it does not follow that the Legislature is powerless to provide for the transfer of suits from one circuit to another for special cause. The constitution requires that an order of

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the Chief Justice shall be necessary to enable a judge to hold a *term* of court for another judge, referring to the terms of courts as appointed by law. The law of 1852, chapter 521, section 6, requires the judges to hear and decide cases pending in equity, whenever they are in a condition to be tried, whether in vacation or in term time, and the rules of practice in suits in equity declare that the Circuit Courts, as courts of equity, shall be deemed *always open* for all purposes preparatory to the hearing of all causes.

It may frequently happen that circuit judges may be incapacitated for attending to business by reason of absence or illness, or other cause, and every lawyer knows that there are emergencies in which a brief delay may be disastrous to the interests of their clients, as when a writ of injunction is necessary to prevent the destruction or injury of property, or its fraudulent transfer, or its removal, or where a writ of *ne exeat* may be imperatively necessary, and the like cases. To require that an order be first obtained from the Chief Justice, or that parties should be subjected to the delay necessary to effect a change of venue, would in many cases result in the absolute defeat of justice, and the destruction of the fortunes and the cherished rights of innocent persons. Such a construction cannot be tolerated in the absence of an express provision forbidding the exercise of the necessary power by the judicial authorities.

The act of the judge of the Fourth Circuit in granting an order in a case pending in another circuit under the law referred to, in the case of the legal or physical incapacity of the judge of the latter circuit, is intended and expressly declared to be the act *pro hac vice* of the judge in whose stead he officiates. But it by no means follows that the law contemplates that the cause is transferred by such an emergency to the circuit of the judge who grants an order under the circumstances mentioned. The order so made is to be considered as the order of the court or judge having jurisdiction in the first instance and the papers should be filed

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and the order entered of record in the office of the clerk of the court in which the cause was pending when the emergency occurred.

We hold, therefore, that the judge of the Fourth Circuit could, in a proper case, make orders in an equity suit pending in another circuit, and this brings us to the question whether his orders granting an injunction and appointing a receiver in the present case were authorized and regular under the law and the rules of practice.

The petition addressed to the judge of the Fourth Circuit, asking him to take cognizance of the case, alleges that the cause had been transferred to Columbia county, Third Circuit; but the record and papers did not show that the transfer had been completed, and he should, therefore, have declined to act, the application to him being based upon the absence from the State of the judge of the Third Circuit who had as yet not obtained jurisdiction of the cause.

But we find, on pursuing the bill of complaint, that many of its essential allegations, and particularly those which are relied upon to show the necessity for an injunction, are stated upon the information and belief of the complainants, and as to some of the allegations, it is stated that the facts are unknown to them, and they pray a discovery. There are no proofs, by deposition, affidavit, or otherwise, of the truth of these facts, beyond the ordinary jurat annexed to the bill. Chapter 1098, Laws of 1860, section 1, provides "that in all suits in equity in this State, when summary process by injunction or otherwise shall be prayed, and the bill justifies such process, and affidavit shall be made of the truth of the statements of the bill, and that the complainant is unable to give bond of indemnity or other security, the chancellor shall receive *ex parte* evidence of the truth of the statements of the bill and of the accompanying affidavit, and if they shall appear to be true, shall grant such process without requiring security."

Here we find no accompanying affidavit or other *ex parte*

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proof of any facts. The complainants submitted an affidavit that "they are unable to give a bond for a sufficient amount to cover the value of the property in litigation in this suit, or for the amount of receipts and earnings of the Pensacola and Georgia, and St. Marks, and Florida, Atlantic and Gulf Central Railroad Companies," and this is the only affidavit or proof submitted, as appears in the record. It does not comply with the law above quoted, nor does it appear what security was required by the judge, or that he required any security. His order in the matter endorsed upon the bill simply says: "Let injunction issue as prayed;" signed "A. A. Knight, Judge Fourth Judicial Circuit."

It is very clear that the granting of an injunction upon this bill, without any accompanying affidavit or proof, and without exacting security, and without such an affidavit of inability to give "bond of indemnity or other security," was not warranted by law. "In summary proceedings, where a court exercises an extraordinary power under a special statute prescribing its course, we think that course ought to be exactly observed, and those facts especially which give jurisdiction ought to appear, in order to show that its proceedings are *coram judice*, otherwise the proceedings are not merely voidable, but absolutely void." *Thatcher vs. Powell*, 6 Wheat., 119.

This authority is but an enunciation of a well settled rule in judicial proceedings, and it is quite applicable to a part of the case already considered.

It is insisted by the appellants that notice of the applications for an injunction and the appointment of a receiver should have been given, and that it is required by the rules of the court of chancery. This is undoubtedly the general rule, but we cannot say that emergencies may not exist which will warrant the exercise of the power without notice. Yet looking at this record, it is discovered that the bill was filed in Leon county on the 11th of August, the order of transfer was made on the 27th August, and the application

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to Judge Knight for his action was made on the 21st of September. From this long delay of the complainants, it is not inferred that the emergency was so pressing as to require the appointment of a receiver and the allowance of an injunction without an attempt to serve notice upon some of the several defendants residing within the county and city where the Judge resided, and where he granted the applications as appears in the record, and before a subpoena had been served upon any of the defendants.

It is deemed unnecessary in the present aspect of this case to consider the merits of the bill upon this appeal, in view of the conclusions already arrived at. The appeal is from the order and decree of the Judge of the Fourth Circuit, and these orders having been entered of record and the papers filed in the circuit court of Duval county in that circuit, the injunction having been issued by the Clerk of Duval, the receiver's bond filed also in his office, the amended bill entitled as of that court, and the complainants' petition to Judge Knight being also entitled of the Circuit Court of Duval county. It is deemed that the suit commenced in Leon county has never been transferred by the order of the judge of that court or of any other judge, or by operation of law, to Duval county, or any other county in his circuit, and is not properly pending there.

The law and practice in courts of chancery are so well known, that it may be improper to consider and decide in advance of the future action of the proper circuit court, (where the case may be presented on a different state of pleadings,) upon the merits of the bill as it now stands, nor would any opinion thereon affect the proceedings of the court from which this appeal was taken.

It is thereupon ordered and decreed, that all and every of the orders, and decrees of the Circuit Judge of the Fourth Judicial Circuit, entered in the office of the Clerk of the Circuit Court for Duval county, in this cause, be and the same are hereby reversed and set aside, and the Judge of

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the said Circuit Court is directed to cause all the papers filed in that court, which were originally filed in the office of the Clerk of the Circuit Court of Leon county, to be forwarded and returned to the Clerk of the Circuit Court for Leon county, including the certified copy of the order of transfer made by the Judge of the Second Circuit.

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1. Where the statute prescribes a particular mode of serving the process, and that the officer's return shall show the precise manner of service, a return stating that the process is "served on the within named party," is not sufficient to authorize the entry of a judgment or decree. The statute must be strictly pursued in such cases, otherwise the court has not jurisdiction of the person of the party to be served.
2. An appearance for the purpose of objecting to proceedings does not necessarily waive irregularities in the service of process.
2. An appeal by a defendant may be considered such an appearance in the cause that the Circuit Court, on the return of the cause, may proceed thereafter as though the appellant had been served with process.

The case is fully stated in the opinion of the court.

J. J. Finley for Appellant.

It is contended that the chancellor in the court below did not exercise a sound judicial discretion in refusing to set aside the decree *pro confesso*, which had been entered in the cause, and in not allowing the defendant to put in her answer. That relief against a decree *pro confesso* is a matter of sound discretion, see 1 Daniel Chy. Pr. and Pl., 509, note 2; 1 Johns. Chy., 539, 630.

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It is contended that the chancellor should have set aside the master's report; 1st. For want of notice to the defendant of the time and place appointed for the examination before him. Rule 75, Chy. Rules for Cir. Ct. of United States. 2d. Because the last report "prepared over" by the master under the order of January, 1868, was irregular and without notice to the defendant.

It is contended that the defendant should have been allowed to make her exceptions to the last report made and returned by the master.

It is contended that the clerk of the court below should have entered in the order book the day of the return of the master's report. See Rule 83, Chy. Rules.

It is contended that the filing mark of the clerk should have been endorsed on the report of the master when it was returned to the clerk's office.

It is contended that the master should have given notice to the defendant of the time and place appointed by him for taking the account. Rule 75, above cited; 1 Daniel Chy. Pl. and Pr., 571.

It is contended that the defendant was not properly before the court when the decree *pro confesso* was entered in the cause, she not having been served with process in the manner required by law. See Thomp. Dig., 450; 1 Johns. Chy., 8; 3 Paige, 263; 10 Ohio, 275.

A rule for an answer, when process has not been rightly served, and a decree *pro confesso* for want of an answer, is irregular. 3 McLean, 283.

C. P. Cooper for Appellee.

The subpoena in original cause was returned to the first day of the term as prescribed by law. Thomp. Dig., p. 451, par. 5; Pamph. Acts Gen. Ass. of Fla. of 1858-9, organizing the Suwannee or Fifth Judicial Circuit, p. 29.

There was no appearance entered by appellant to the original bill of Arnow vs. Standley, either on the chancery order

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book, or the bar, bench, or motion docket, and no answer, plea or demurrer filed, hence a decree *pro confesso* was taken. Thomp. Dig., p. 451, par. 5. Rules of Practice in Equity in Cir. Ct. U. S., Title—"Service of process," "Appearance."

Appellant was sought to be represented by solicitor S. Y. Finley, Esq., on the day the final decree was rendered, on motion to vacate and set aside master's report, supported by affidavit of merits, but the court overruled the motion on the ground of laches and non-compliance with the law. Thomp. Dig., p. 457; 4 Fla., pp. 14-15.

Appellate court will not control discretion of the lower court. 6 Fla., 359.

No appeal lies from the decree in this case, because it is not an interlocutory decree and does not come under the provision of the Act of 1853, and because it is a final decree based upon a decree *pro confesso*. 4 Fla., 11, 206; 12 Fla., 300.

Courts do not favor laches; "the law is made for the vigilant and not the sleeping," is a maxim on which all courts, whether of equity or common law, act. Broome's Legal Maxims, 857; 1 Story's Eq. Jur., last clause of sec. 200; 2 Story's Jur., secs. 894-5-6-7; Hilliard on Inj., 24-5, sec. 43; Broome's Legal Maxims, 325-4; Bouvier's Law Dict., 2 vol. Title—"Laches."

L. Dozier, assignee of J. M. Arnow, is an innocent third party purchaser, as appears by assignment endorsed on the decree, and made a matter of record in said cause. The rights of such are protected by courts of equity. Story's Eq. Jur., vol 1, secs. 108, 165, 381, 409, 410, and note 411, 434, 436, 630, 631; Fonblanque's Eq., 54, sec. 8, note; ib., 412, note; 1 Johns. Chy., 300; Mun., 557; 2 Mun., 314; 1 Wash., 217; 3 Yeates, 271; 8 Sarg. & Rawles, 446; 2 Des., 323; ib., 563; 1 McCord, 119; 2 Fla. S. C. R., 268, 269.

Fraud or irregularity (even if the same existed,) does not

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affect an innocent third party purchaser without notice, and such notice must be *alleged*. 4 Fla. S. C. R., 21; 2 Fla. S. C. R., 268, 269.

No irregularity or fraud appears by the record, and appellant is bound by the record and cannot invoke anything extrinsic or *de hors* the record. 5 Fla., 533; 4 Fla., 21; Broome's Legal Max., 327.

The decree *pro confesso* was in conformity with the rules of practice. Index S. C. R., Rules of Practice, p. 202, sec. 4; p. 203, sec. 5; p. 205, secs. 18, 19, under head "Bills taken *pro confesso*."

RANDALL, C. J., delivered the opinion of the Court.

A subpoena in chancery was issued on the 29th of August, 1866, direct to the appellant, requiring her to appear at the next term of the Circuit Court for the county of Alachua, to answer to a bill of complaint of the respondent.

The subpoena was returned, endorsed as follows: "Executed by serving a true copy on the within named party, September 11, A. D. 1868. John C. Cosby, Sheriff, S. C. Bevill, Deputy Sheriff."

On the first Monday of November, 1867, the complainant entered an order that the bill be taken as confessed, the defendant not appearing, which order was confirmed and made absolute by the Judge November 20, 1867, and the cause referred to a master to take an account, &c.

On January 15, 1868, the defendant, by her solicitor, moved the court to set aside the report of the master, for want of notice of the hearing before him, and also to set aside the order *pro confesso* on the ground that she had a meritorious defence, and because no subpoena in said cause had been served upon her, which motion was overruled by the court.

A final decree was entered in June, 1868, against the appellant for the sum of seven thousand, seven hundred and

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four 67-100 dollars, from which decree she has appealed to this court.

In view of the conclusion to which we have arrived upon one ground, sustained by abundance of authorities, it is unnecessary to consider other points in the disposition of this case.

The seventh ground stated in the petition of appeal is, "that the defendant in the court below was not properly before the court when the decree *pro confesso* was entered, she not having been served with process in the manner required by law."

The statute provides that the service of subpoena in chancery "may be either by a delivery of a copy thereof to such defendant, showing the original at the time of such delivery, or to the wife of such defendant, or any white person above the age of fifteen years, residing in his family at the time of such delivery, at the dwelling house or usual place of abode of such defendant;" and when such service shall be made by the officer of the court, "it shall be his duty to note in writing the time at which it came to his hands, and when served, the *manner* of the service thereof, which note shall be subscribed with his name and office;" and "to make return of all process placed in his hands, and of the proceedings thereon, immediately after the execution or service thereof." Thomp. Dig., 450-51.

It is contended by the appellant that the return by the sheriff, "executed by serving a true copy on the within named party," is not such evidence of service as the law requires, in order to lay a foundation for subsequent proceedings against her. If the evidence of service was not sufficient to found such proceedings upon, then clearly the complainant was in error, and the defendant is entitled to a reversal of all the orders and proceedings had subsequent to the filing of the bill and issuing the subpoena.

The doctrine that no person shall be deprived of property unless by due process of law, reiterated in all American con-

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stitutions, gives every person the right to demand that the law shall be strictly complied with in all proceedings which may affect his title to his property.

The courts, in pronouncing judgments against persons, must have jurisdiction of the subject matter and of the persons affected. A defect in the jurisdiction of the court may render its proceedings void. Where the statutes point out the mode of acquiring jurisdiction over the person, it must be strictly pursued.

Our statute points out the particular manner in which the court of chancery may obtain jurisdiction over parties defendant, and the courts cannot recognize any other mode of acquiring such jurisdiction, except by the consent of the party. In this case, as in all cases, the defendant is not bound to answer unless he is served with the process of the court. To constitute "service," the steps designated by the law must be followed, and one of the several modes must be shown by the officer's return, to have been pursued; otherwise the court is not informed whether the party is before it. The statute requires the method of service to be reported to the court by its officer, in order that the court may determine whether the party is properly summoned. The ordinary presumption that an officer has properly performed a service, does not arise where the particular acts constituting the service are required to be set forth, as in the statute referred to; and if there be no such evidence of service as the law requires the defendant is not required to appear and answer. Not only is the return of the sheriff deficient in reference to the manner of service, but it may be considered uncertain whether the word "party" refers to the defendant. The return says: "Served on the within named party." If the service had been upon the complainant, the return would be equally true as though it were on the defendant, for both are "named" in the writ.

There is certainly no evidence of service in this case, without resorting to the presumption that the sheriff has

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done what the law required. Justice Bronson, in the opinion, of the Supreme Court of New York, in *Bloom vs. Burdick*, 1 Hill, 136, says: "I do not think that much importance should be given to that presumption where, as in this case, it is resorted to for the purpose of making out a vital jurisdictional fact." "The rule that there must be jurisdiction of the person, as well as the subject matter, has been steadily upheld by the courts, and it cannot be relaxed without opening a door to the greatest injustice and oppression."

The Supreme Court of Illinois, in *Wilson vs. Greathouse*, 1 Scammon, 174, says: "It is essential to the exercise of all jurisdictions rendering judgments or decrees affecting the persons or property of individuals, where the proceeding is by summons directed to the defendants, that they should have indisputable evidence before them that the party to be affected by their judgments or decrees is regularly before them, otherwise their proceedings are *coram non judice*; consequently irregular and void. This evidence must be actual or constructive. Now where there is no evidence that the process by which the party is to be called before the court has been duly served according to the law prescribing the time and manner of service, can it be contended that a judgment may be rendered against such party by default, and execution issue against him? The plaintiff, in a case where the defendant does not appear, proceeds at his peril; he is bound to see that all antecedent proceedings are regular, and if they are not, he necessarily consents to meet the consequences of such irregularities." And in *Dilty vs. Chambers*, 2 G. Greene, (Iowa,) 479, the court says: "When the statute points out the manner of service, the officer must follow its directions. It is the service which brings the defendant into court, and unless the return shows the writ to have been served according to the statute, the defendant is not obliged to respond to it. The return of the officer should show a strict compliance with the law, as nothing will be presumed in its favor when it appears that the requirements

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of the statute have not been observed." The statute referred to is substantially like ours.

This view is sustained in *Gilbreath vs. Kuy Kendall*, 1 Pike, 50; *Clemson & Hunter vs. Hanm*, 1 Scammon, 175; *Smith vs. Cohea*, 3 How., (Miss.), 35; 5 How., 661; 1 *Smedes & Marsh.*, 595; 6 Vt., 577; 2 Gill, 62; 6 N. H., 217; 4 Vt., 119; 2 Bibb, 572; 4 ib., 84, 168.

An appearance by the appellant for the purpose of making a motion, based upon an alleged irregularity, and asking leave to defend, is not such an appearance as will waive service of process or cure the irregularity.

An appearance for the purpose of moving to quash a summons, is not such an appearance as will authorize a judgment. *Ferguson vs. Ross*, 5 Ark., 617; *Kimball vs. Merrick*, 20 Ark., 12; *Abbott vs. Simple*, 25 Ill., 107.

A general appearance in a cause indicates that a party consents to the jurisdiction; but where a party appears and questions the jurisdiction by a motion based upon an alleged defect of jurisdiction, it would be violent presumption to say that he consents by objecting. It was also held, in *Maude vs. Rode*, 4 Dana, 144, that the fact that a party appeared on the hearing in the inferior court and objected to the jurisdiction, did not authorize a decree against him.

The decree of the Circuit Court, and all the orders and proceedings therein subsequent to the return of the subpoena, must therefore be reversed, with costs; but as the appellant has made herself a party to the suit by voluntarily appearing and prosecuting her appeal, she must, upon the return of the cause to the Circuit Court, be considered as regularly before the court in like manner as if she had been duly served with process.

This course has long been pursued by the Court of Appeals in Kentucky and the Supreme Court of Arkansas, and is adopted as a proper practice in like cases. *Vide* 1 Pike, 50, 376, 386, 405; 4 Bibb, 84, 167.

This cause is, therefore, remanded to the Circuit Court for

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the county of Alachua, to be proceeded in by that court as, though the defendant below had been duly served with process returnable on the rule day next after the filing of a certified copy of the mandate of this court in the office of the clerk of said Circuit Court.

JOHN BURNS, APPELLANT, VS. JANE BURNS, APPELLEE.

1. A statement in a bill for divorce that the complainant is, and has been for more than two years a resident of this State; that the parties were married at Jacksonville, in this State, in April, 1862, "where the parties have ever since lived," is a full compliance, as to the pleadings, with the statute, which requires that "it shall appear that such applicant has resided in the State of Florida for the space of two years prior to the term of such application," and is a sufficient allegation of the time of marriage.
2. Where a divorce is prayed on the ground that the defendant "is habitually intemperate," it is not necessary to specify more definitely the facts constituting "habitual intemperance," the charge of itself implying that the defendant has a persistent habit of becoming intoxicated from the use of strong drinks, and thus rendering his presence in the marital relation disgusting and intolerable.
3. Where the charge in a bill for divorce is that defendant "habitually indulges in violent and ungovernable temper, and is extremely cruel to his wife," and proceeds to specify that he uses threatening, blasphemous and abusive language towards her, on many occasions threatened her with fatal violence, and attempted to carry his threats into execution, so that she has had to seek safety in flight; and in an amended bill reiterating these charges, it is alleged that the defendant has put and continues to keep complainant in fear of bodily harm from his violence and abuse: *Held*, That the defendant having taken direct issue upon these statements, and proceeded to a final hearing without requiring a more definite specification of facts, and the allegations appearing to be sufficiently definite to apprise the defendant of the nature of the facts to be proved in order to enable him to prepare his defence, and it appearing that the proofs fully substantiate the charge, a decree of divorce will be sustained.

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4. In civil writs, generally, presumptive evidence, as distinguished from direct evidence of marriage, is, *prima facie*, sufficient, as where a man and woman have cohabitated together, speaking habitually to and of each other as husband and wife, and of the time and circumstances of their marriage, and the like; but in suits where criminal conversation, adultery, &c., constitute the essence or foundation of the action, a more rigid rule is required.

This is an appeal from a decree rendered in the Circuit Court for Duval county.

The bill charges that complainant is, and has been for more than two years, a resident of this State; that she and defendant, John Burns, intermarried in 1862 at Jacksonville, in said State, where the marriage was solemnized according to law, and "where the parties have ever since lived;" that defendant "habitually indulges in violent and ungovernable temper, and is extremely cruel to his wife;" that he is "habitually intemperate;" that he has used threatening, blasphemous and abusive language towards her on many occasions, and threatened with fatal violence, and attempted to carry his threats into execution, so that she has had to seek safety in flight.

The amended bill further says that the defendant put and continues to keep complainant "in fear of bodily harm from his violence and abuse."

The defendant's answer expressly denies each charge made in the complaint, except that the parties were married, and charges that all the allegations "are a tissue of falsehoods and entirely fabricated;" that he and the complainant lived happily together as husband and wife from the time of their marriage to about July, 1867, and then details a long history of matters which have little bearing upon the case, except to show that a state of rare conjugal infelicity existed between the parties.

On consideration of the testimony, the Circuit Court decreed a dissolution of the marriage on account of the "habitual

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indulges by the defendant in violent and ungovernable temper," and "habitual intemperance."

From this decree the defendant appeals.

H. Bisbee, Jr., for Appellant, with whom were *D. C. Dawkins* and *J. B. C. Drew*.

H. Bisbee, Jr., for Appellant.

1. The allegation of two years' residence is not in compliance with the statute. 12 Fla., 449, 450, 451, 466. This allegation must be so framed as to leave no room for construction or inference to the contrary. *Ib.*, 451.

2. Date of marriage is not alleged with sufficient certainty. *Ib.*, 465-466.

3. The allegation of the grounds of divorce, in the language of the statute, is not sufficient. The facts, or some of them, which, when proven, constitute said grounds, must be specified in the bill. Unless this is done, no amount of evidence will justify a decree. 2 Bish., 651, 652, 653, 654, 657, 658, 684, 685. All of these sections are directly to the point. Also 12 Fla., 449, 452, 453, 454.

The opinion of the court in this case settles the principle to be as above stated; which opinion cites the following authorities: 4 Wis., 135; 16 N. J., 391; 4 Iowa, 325; 27 Me., 563; 2 Paige, 112.

The same doctrine is enforced in 2 Dev. & Battle's Rep., 377, 387; *ib.*, 64, and note on p. 77; also, in 2 Ire. Law Rep., 484.

4. The bill does not allege the habitual indulgence of a violent and ungovernable temper *towards complainant*, which is essential. 12 Fla., 452. There is no evidence to support the allegation of marriage. An actual marriage must be proven as alleged. 2 Bish., secs. 262, note 4, 263, 274, 270, 275, 253, 266. Admissions of marriage by the parties insufficient. 2 Bish., 240, 241, 242.

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5. The charge of the habitual indulgence of a violent and ungovernable temper is not sustained by the evidence.

If this ground for divorce means the same as extreme cruelty, and requires as strong evidence to sustain it, then the evidence does not sustain it in the opinion of the court below, nor according to the following authorities. Courts cannot interfere unless personal violence is shown, with a reasonable apprehension of a repetition of the same, or a reasonable apprehension of violence. 1 Bish., sec. 720, 743; ib., sec. 720.

6. The grounds to justify divorce must be grave and weighty. 1 Bish., sec. 720, 743; ib., 720. The decree should be based upon the general character of defendant, rather than upon particular acts. 2 Bish., sec. 653, note. A single act of gross cruelty may be sufficient to authorize a divorce where it is shown that the defendant's general character is bad, and *the wife is in great danger*, but not where a husband's general character is good and there are only occasional sallies of passion. 1 Bish., sec. 746, 740; ib., sec. 747, 748, 720; 12 Fla., 440, 441. If what is complained is the result of complainant's own misconduct, she cannot complain with effect. 1 Bish., sec. 764, 767, 768.

7. That habitual indulgence in a violent and ungovernable temper is not proved, but only occasionally in a period of several years, and when provoked by complainant.

8. Habitual intemperance, to justify divorce, must be such as to incapacitate the party from attending to business. 1 Bish., sec. 813.

The testimony of complainant's son is unreliable, and should be cautiously received. The same remark will apply to Callahan's testimony respecting defendant's habits. He is contradicted by eight witnesses, which clearly proves his testimony false touching defendant's habits, and this throws discredit upon all his testimony, on the principle that "*falsus in uno, falsus in omnibus*."

The general statements of witnesses respecting defendant's

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character are not sufficient. They must state facts from which the court is to judge of the conduct.

Sanderson & L'Engle, for Respondent.

Let us apply the testimony as given by the record, to the law as laid down in all judicial cases.

Does the evidence establish cruelty—that is legal cruelty—sufficient to authorize a decree of divorce? Legal cruelty is defined thus: "Cruelty is such conduct in one of the parties as renders further cohabitation dangerous to the physical safety of the other, or creates in the other such reasonable apprehensions of bodily harm as materially to interfere with the discharge of marital duty." Bish. on Marriage and Divorce, Vol. 1, sec. 715; or as in, sec. 717.

In sec. 718, the learned author says: "In respect to cruelty, the words of the statute differ in the different States, but in legal import they are substantially the same. Thus the several phrases, cruel, inhuman and barbarous treatment, 'extreme cruelty,' or 'cruel and inhuman treatment,' or such conduct on the part of the husband toward his wife as renders it *unsafe* and improper for her to cohabit with him, &c.." are severally construed to mean substantially the same. Apply the facts to this definition, and they will clearly establish the extreme cruelty required by our statute.

1st. Mrs. Burns' own testimony shows abusive and violent language, accompanied by threats to kill—on one occasion a blow, flying from her house for safety, shaking a whip over her head, and running from him, taking refuge in her kitchen and the streets.

The testimony of Mrs. Albin, shows that she feared for the life of Mrs. Burns, called her into her room and sent for her husband.

That violence actually executed is not necessary is firmly established as any principle of law can be. 1 Bish., sec. 730. And where words of menace are the grounds of the suit,

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they need not be addressed to the wife. The test is, whether they excite a reasonable apprehension of bodily harm. Lord Stowell has observed, "They carry with them something of additional strength if they raise apprehension in others, for that shows that the wife was not alarmed upon any unreasonable grounds." Cited from the latter part of sec. 732, 1 Bishop.

Sir William Scott in *Evans vs. Evans*, says: "That if austerity of temper, petulance of manners, *rudeness of language*, a want of civil attention, occasional sallies of passion, do *threaten bodily harm*, they amount to legal cruelty. 1 Bish. sec. 732.

If the passions of the husband are so much out of his control as that it is inconsistent with the personal safety for the wife to continue in his society, it is immaterial from what provocation such violence originated. 1 Bish., sec. 734.

When a husband ill treats a child or other relation of her's, for the purpose of harrassing his wife, it is cruelty. Section 736, 1 Bish.

All the circumstances, viz: Drunkenness, treatment of child, cruelty to mule and cow, breaking dishes in dining room, may be taken together in connection with his threats of personal violence, as the evidence of ungovernable temper, and as showing that complainant had good reason to apprehend bodily harm, which will justify under our statute a decree of Divorce for extreme cruelty.

There have been many acts established by the evidence. but the law does not require many acts. Sec. 744, 1 Bish.

There has been no misconduct shown on the part of the wife by any of the witnesses; even Burns himself says she was kind in his sickness. The weight of evidence is that she did not reply when she was cursed and abused by him—she assigns the reason that she was afraid.

The rule governing this class of cases is based upon the proposition, that a divorce is granted rather to prevent danger apprehended, than to punish what is already done. 1

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Bish., sec. 747, 480. Hence it follows that all the circumstances together must be taken into consideration. The question is not whether this or that fact alleged would authorize the court to pronounce a divorce, but whether all the facts combined *ought* to lead to *that result*.

Taken then the intemperance, the violent temper, abusive language, threats of personal violence, threats to kill, causing wife to flee for safety, refusing to contribute to support of wife, and in one instance, giving her a blow on the throat; all these continuing through a series of two or three years, constantly increasing in frequency and violence, certainly cannot fail to produce on the mind of the court that legal cruelty, required by our statute, and to constrain it to grant a decree of divorce.

The appellant's counsel having assumed the position that the divorce should not be granted because the proof of marriage was not made, we contend that the admissions of the defendant in his answer, and his own testimony, establish the marriage with sufficient clearness.

In Bishop on Marriage and Divorce, the learned author says: "It is obvious that no witness, especially no non-professional witness can better know whether a fact of marriage has transpired between the parties than the parties themselves. Therefore, a deliberate admission or confusion of such a fact, be the fact confessed to a marriage at home or in a foreign country, is competent evidence against a party. 1 Bish. on Mar. and Div., 497; 3 Rich., 434; 1 Bish. on Mar. and Div., secs. 13, 457-8; 2 Ib., sec. 268, citing 20 Ala., 168; 6 Texas, 3; 3 Ind., 76; 16 Ill., 85; 1 Greenl. on Ev., sec. 107; 2 Ib., 462; 4 McCord, 256.

RANDALL, C. J., delivered the opinion of the Court.

The petition of appeal states several grounds upon which the defendant seeks to avoid the decree, and we proceed to examine them *seriatim*.

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1. "That complainant's allegation of his past residence is not in compliance with law."

The statement in the bill is, that "the complainant is, and has been for more than two years a resident of this State," that the parties were married at Jacksonville in this State, according to law, in April, 1862, "*where the parties have ever since lived.*"

The statute says that "no divorce shall be granted to any applicant unless it shall appear that such applicant has resided in the State of Florida for the space of two years prior to the time of such application." Laws 1852, chap. 522.

It is not apparent that the complainant could by the use of any other form of words, have stated more positively than she has done, that she has resided in this State for the space of two years prior to time of filing her bill. It is further urged, "That the date of the marriage is not alleged with sufficient certainty."

It would be trifling to expend any time or words upon this proposition.

2. "That the allegations in the bill of the statutory grounds of divorce, without alleging specific facts to constitute said grounds, are insufficient to sustain a decree;" and 3, "That one of the grounds upon which said decree is based, to-wit: the habitual indulgence of a violent and ungovernable temper, is defectively alleged, in this, that it is not alleged that the violent and ungovernable temper was indulged in toward the complainant."

It might be deemed a waste of words to specify under the charge of "habitual intemperance" any series of facts in order to make this charge more definite. The charge of "habitual intemperance," in the language of the statute, evidently can only refer to a persistent habit of becoming intoxicated from the use of strong drinks, thus rendering his presence in the marital relation disgusting and intolerable. It would not be more definite and certain if it were charged that the defendant drank intoxicating liquors "on the first

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day, and on the second day, and on the third day," and so on upon each day of each month, or on alternate days from month to month, the general charge of necessity implying the specific facts.

After alleging that "the defendant habitually indulges in violent and ungovernable temper, and is extremely cruel to his wife, this complainant," she defines these charges by further stating, "that he has used threatening, blasphemous and abusive language toward your oratrix on many occasions, and threatened her with fatal violence, and attempted to carry his threats into execution, so that your oratrix has had to seek safety in flight;" and further, in her amended bill, that the "defendant has put and continues to keep your oratrix in fear of bodily harm from his violence and abuse." Thus the complainant has given a statement of conduct on the part of the defendant toward her which apprises him of the nature of the charge, and of the facts which she intends to show by proof to sustain it. It is a series of acts and continued conduct on his part toward her. If she were to allege definite days or weeks, on and during which such acts were committed, she would not in her proofs be confined to the precise time alleged, and under the specifications given, the defendant would be sufficiently apprised to enable him to prepare his defence.

In a case in Alabama, it was alleged by the wife "that her husband soon after their marriage commenced treating her, and did treat her with cruelty and inhumanity. That on various occasions he has inflicted blows upon her in anger and with much violence, thereby endangering her health and life. That he has refused to supply her with the necessities and comforts of life, when it was in his power to have supplied her with them; that he still persists in this course of treatment towards her, and that she cannot with any degree of comfort or safety continue to live with him." On demurrer, the court say: "The case made by the bill is

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a case of marital tyranny; of deliberate, unmanly and continuous cruelty." * * "We think the acts of cruelty are sufficiently alleged, and that there was no necessity for greater particularity in alleging the time, when, and the place where the cruelty occurred." * * "Any conduct on the part of the husband which furnishes reasonable apprehension that the continuance of the cohabitation would be attended with bodily harm to the wife, is legal cruelty to her." *Smedley vs. Smedley*, 30 Ala., 714. We have found no statute of any other State giving a right to sue for a divorce for the cause and in the precise language of our own, viz: for the "habitual indulgence of violent and ungovernable temper," and therefore we find no adjudication upon the question whether under such a charge it is necessary to allege any facts generally, or specifically, beyond those implied or included in the charge itself.

In the nature of this charge against a defendant as a ground of divorce, it is certainly practicable to set forth facts relating to the conduct of a party, which will show whether he indulged in a *violent* and ungovernable temper, and a defendant may be interested in knowing, for the purpose of preparing his defence, what are the facts or the particular nature of the facts which the complaining party intends to prove. It is unnecessary to set out all the acts and circumstances in detail, but it is necessary to give enough of them to indicate the character of the case sought to be made, in order that the court may judge whether, the facts being proved, they will support the general charge.

Applying this rule to the present case, has the complainant alleged generally or specifically such facts regarding the defendant's conduct toward her as to warrant the conclusion that he was guilty of the habitual indulgence of violent and ungovernable temper? It is true that the statement of facts is extremely meagre, but it is still a statement of facts, and exhibits the character of the proof intended to be adduced in support of the charge. If the use on many occasions of

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threatening, blasphemous and abusive language, threatening complainant with fatal violence, and attempting to carry such threats into execution and compelling her to seek safety in flight, and the subsequent statements in the amended bill, (filed some months after the filing of the original bill,) are that the defendant continued to keep the complainant in bodily fear on account of his violence and abuse, be not a statement of facts, (however meagre,) we are unable to distinguish between facts and conclusions. The defendant neither demurs, nor makes any attempt to obtain a more full and specific statement of distinct facts, nor to arrest the progress of the suit, but takes issue upon the facts as stated, and the cause proceeded, at the expense of much time and money, to the taking of a mass of testimony upon each issue and a final hearing and decree. If the brief statement of the facts regarding the defendant's conduct do not amount to a charge of extreme cruelty, it is conceived that they at the least show that the habitual temper of the defendant was violent and ungovernable. That it was *violent*, is too apparent for question. If it was not "*ungovernable*," it was at least willful, malicious, and cruel. It is a charitable construction to infer that the conduct alleged was the ebullition of an ungovernable temper, and if the charges are true, they "furnish reasonable apprehension that the continuance of the cohabitation of the parties would be attended with bodily harm to the wife," and that the marital relation ought to cease.

The 4th ground of error is, "that there is not sufficient evidence of marriage to sustain the decree."

The bill alleges a marriage; the answer admits in various forms of language that the parties were married. The complainant in her testimony states that she was married to the defendant, and mentioned the time, and that she has resided in this State between sixteen and eighteen years. The defendant swears that the complainant owned property in Jacksonville "at the time of my marriage with complain-

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ant," and repeatedly alluded to her as his wife, and to the time they were married. One witness (Mitchell) states that he was a frequent visitor at complainant's house before her marriage, and "was at her house the night they were married." Nearly all the witnesses prove cohabitation, and that they lived together in this State during the entire period from the marriage to the time of separation, and spoke of each other as "husband" and "wife." Under the rule referred to in Bishop on Marriage and Divorce, and the decisions of the courts of various States this proof of the marriage, for the purposes of a civil suit, is ample, for we have not only the testimony of both parties to the fact that they were married, but also the testimony of several witnesses that the parties invariably spoke of each other as husband and wife, and that they cohabited as such. "When parties are living together as husband and wife, the legal presumption, favoring innocence, is, that they are persons married to one another, and not persons living in the violation of morality, and decency, and law. But when the issue to be decided in the case is such as to show that the one against whom it is decided had violated morality, and decency, and law, if the other party were married to a third person, then no presumption of such marriage can arise simply from cohabitation as husband and wife." "In prosecutions for criminal conversation, and upon an indictment for adultery, there must be direct evidence of the marriage, in distinction from presumptive evidence." 2 Bishop on Mar. and Div., 272, 275.

The 5th, 6th and 7th grounds urged are, that the testimony does not sustain the allegation of habitual indulgence of a violent and ungovernable temper toward the complainant, or of the habitual intemperance of the defendant.

It is sufficient for the purposes of this appeal to remark that we have examined carefully all the testimony in the case, and the conclusion is, that the proofs fully sustain these charges. There is some conflict in the testimony, but not of such a character as to lead to any other conclusion. The

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testimony of the defendant generally contradicts everything sworn to by the complainant upon these points, and our judgment is founded upon the testimony of the other witnesses. Upon this testimony, we think any fair jury would find that the charges in the bill are true as found by the Circuit Judge.

The decree is affirmed with costs.

JOHN BURNS, APPELLANT, vs. JOHN P. SANDERSON AND
JANE BURNS, APPELLEES.

1. Where a decree of divorce has been passed, an appeal taken, and supersedeas awarded, a court of equity should not award an injunction to control the operation of the supersedeas.
2. Where the legal estate is in the trustee, actions founded upon the legal title must be brought in his name. So also has the trustee the right at law to institute all proceedings authorized by statute or otherwise, to redress injuries to his possession, and to evict defaulting tenants.
3. That defendant "has interfered and intermeddled with the property, and still continues to do so, and has and still continues to forbid the tenants and lessees to pay the rents to the plaintiff, and has forcibly entered one of the buildings on the premises," does not lay a foundation for an injunction. There are clear remedies at law for a failure of a lessee to pay rent. The forcible entry is remediable at law also, and the terms "interfering and intermeddling" do not disclose a case of threatened trespass, accompanied with irreparable injury or other circumstances calling for the aid of a court of equity.

This is an appeal from the Circuit Court for Duval county.
The case is fully stated in the opinion of the court.

Bisbee & Archibald and *J. B. C. Drew* for Appellants.

Sanderson & L'Engle for Respondents.

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WESTCOTT, J., delivered the opinion of the court.

John Burns, the husband, and Jane Burns, his wife, join in the execution of a deed of conveyance of the separate property of the wife of John P. Sanderson, in trust, to collect and apply all the rents, issues and profits thereof to the sole, separate and exclusive use of the wife during her life, the said trustee to have, as is expressed in the deed, "full power and control of the premises, and to enter upon and evict therefrom any tenant whatsoever, even the husband." The separate acknowledgment of the wife to the deed was not taken at the date of its execution by the parties, but sometime subsequent thereto. After the execution of this deed the wife files a bill for divorce, which the chancellor decrees upon the hearing. From this decree an appeal is taken to the Supreme Court by the husband, and the decree of divorce is superseded. The bill alleges that before and subsequent to this decree the husband "has interfered and intermeddled with the property and still continues to do so, and has and still continues to forbid the tenants and lessees to pay the rents thereof to the wife or to the trustee, J. P. Sanderson, for her use, and has forcibly entered one of the buildings on the premises without the consent of the wife or of the trustee."

There is much stated in the pleadings as to the capacity of the parties to labor, the amount of labor they do and have performed, and like matter, all of which is immaterial and unnecessary. The prayer of the bill is, "that the husband, his agents, attorneys and lessees, may be restrained during the pendency of the appeal in the divorce, and until the suit for divorce shall be finally disposed of, from interfering or intermeddling with the property, and from leasing or attempting to lease the same or any part thereof, and from collecting or attempting to collect the rents thereof, and from using, entering, occupying, or in any way asserting or exercising any possession or right of possession of the said

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premises." Upon the filing of the bill, and after answer, the injunction was granted. From this order granting an injunction this appeal is prosecuted.

It is entirely unnecessary to examine in this case any of the questions in reference to the deed or other matters raised in the answer; for, granting that the case is, as stated by the bill, and without reference to the answer, the remedy to the extent that a wrong is disclosed in the bill, is at law and not in equity.

As to the appeal in the divorce suit, the results produced by superseding the decree in this independent and distinct suit, whatever they may be, cannot be controlled by an injunction. The result of the supersedeas must stand until the appeal is determined. The chancellor, having rendered a decree in one case, and that decree having been superseded by an appeal, cannot, in an independent proceeding, control or destroy the effect of the supersedeas. There is a class of cases where courts of equity will take action in reference to rents and profits under peculiar circumstances, after the legal title has been established at law. Thus, if after a recovery in ejectment at law; the plaintiff is prevented by an injunction in equity from enforcing his judgment, and he has no remedy at law for the rents, a court of equity will entertain a bill for an account. So also where a party has recovered at law in ejectment in a State court, and a *certiorari* issues improvidently from a court of the United States at the instance of the failing party, who is in possession, and a State court, to prevent a conflict and out of comity, suspends execution of its judgment, there the State court should, under certain circumstances, secure the rents through the appointment of a receiver. The distinction between the case now under consideration and this class of cases, is manifest.

The acts of the husband in reference to this property, which plaintiff thinks justifies the interference of a court of equity, are, in the language of the bill, "that he has interfered and intermeddled with the property and still continues

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to do so, and has and still continues to forbid the lessees to pay the rents thereof to the wife or to the trustee for her, and has forcibly entered one of the buildings on the premises."

If the effect of the deed is not to divest the husband of his right to manage the separate property of the wife without liability to account for the rents and profits, then these acts constitute no wrong. If the effect of the deed is to pass the legal estate to the trustee, and enables him to apply the rents to the use of the wife, then it is his right, and he should take possession of the estate and give notice to the tenants to pay him the rents, and every action founded upon the legal title should be brought by the trustee, or in his name.

The remedy for the forcible entry, if it is a wrong, is at law, and whether it is a wrong the court of law should determine. The terms "interfering and intermeddling with" the property are so general that it is impossible for the court to determine whether the acts do or do not amount to a trespass. If they do amount to a trespass, and the deed enables the trustee to maintain trespass, and he is otherwise in a condition so to do, then it is only under very peculiar circumstances that a court of equity would prevent trespass by an injunction. *Eden on Injunc.*, 233-35. The bill does not allege that irreparable damage or mischief will ensue, nor does it state the facts complained of so that the court may form its own conclusion in reference thereto, except in so far as it alleges that he "has forbid the lessees to pay the rents to the wife or to the trustee." 7 Ga., 49; 5 Cal., 119; 10 Ind., 117; *Hill on Inj.*, 319 to 322.

If the lessees fail to pay the rent to the party who is entitled to receive, the party entitled to receive has his action at law to recover the rent, as well as to dispossess them. In addition, it may be remarked that the answer sets up that the premises, the *locus in quo*, have been the subject of a proceeding by the trustee to recover possession, and that after trial the right of possession was determined in favor of the

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husband. The court of chancery could not properly reverse such a judgment, however erroneous it may have been, and with such a statement in the answer, thus accounting for the possession of the defendant, no injunction to restrain a trespass or the enjoyment of possession should have been granted.

The interlocutory decree rendered in this case is reversed, the injunction dissolved, and the case remanded with directions to dismiss the bill.

THOMAS WHITLOCK, GUARDIAN OF OSCAR D. JONES, vs.
CHANDLER H. SMITH, *et al.*

1. It is irregular, and sanctioned by no rule of Chancery practice, to direct a special issue as to the lunacy of a party upon particular dates to be tried in a court of law upon an *ex parte* petition of a friend of the lunatic.
2. Two methods of investigating the subject of the lunacy of a party are known to Chancery practice. One is where the matter of lunacy becomes a subject of inquiry in a cause pending. In this case the chancellor may and usually does direct an issue to be tried in a court of law to try the question of the lunacy of the party. The other is where a commission *de lunatico inquirendo* is awarded upon an *ex parte* petition of a friend of the alleged lunatic. Some of the incidents of each method considered.

Appeal from the Circuit Court for Madison County.
The case is stated in the opinion of the Court.

Finley & Patterson for Appellant.

Vann & Whitner for Appellee.

WESTCOTT, J., delivered the opinion of the court.

Thomas Whitlock filed his petition in chancery alleging

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that Oscar D. Jones was, during the years 1867-68, and before that time, a lunatic; that after proceedings instituted for that purpose in the court of chancery, he, the said Whitlock, was on the 2nd of April, 1868, appointed guardian of the estate of said lunatic, for the special purpose of taking charge of and managing the farm of the said lunatic during the year 1868; that during the year 1868, and while the said Jones was of unsound mind, he executed three several mortgages (one to John S. Tooke for \$500, which was afterwards transferred to Thomas & Livingston, one to Chandler H. Smith for \$1,290 39; one to Caldwell & Morris of New York, dated Dec. 11th, 1867, for \$14,246 96,) which cover his entire estate, the mortgages being to secure the firm debts of Wardlaw & Co., of which firm he was a member; that at the time the said Jones entered into co-partnership with these parties, he was incapable of forming a copartnership from insanity; that one of the mortgage creditors, Caldwell & Morris, filed a bill against the alleged lunatic on the 19th Dec., 1868, praying a foreclosure, having previously persuaded the alleged lunatic to acknowledge service and waive notice; that a decree *pro confesso* was entered against said lunatic, and the master was directed to sell all of the property of the alleged lunatic as well as property alleged to belong to his wife, and that the master is taking proceedings looking to a sale of the property under the decree.

The petition prays that this decree may be opened and set aside, and that the petitioner as next friend be permitted to plead, answer or demur to said bill, and that in the meantime all other proceedings be stayed, and for a final decree declaring said mortgage void. There was an additional prayer that the chancellor would appoint the petitioner guardian of all the matters of said lunatic, and that it might be referred to a master to investigate as to the lunacy.

Upon the filing of the petition, it was ordered by the chancellor that the statements in said petition "so far as pertains to the lunacy of the said Oscar D. Jones, be referred to a

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jury at the next term of the circuit court," and citations were ordered to be issued to certain parties whom the petition affirmed were persons who had made contracts with the alleged lunatic during the period of his insanity, as well as to all parties having suits against said lunatic, to be and appear at said term, and directing further that subpoenas should issue to such witnesses as may be required by either or any of the parties. Citations were issued to several parties and subpoenas were issued. A jury was empanelled at the succeeding term of the circuit court, and were sworn to well and truly try "the issue joined, viz: whether O. D. Jones was a lunatic and mentally incapable of managing his business on the 11th Dec., 1867, and on the 4th Dec., 1868." The issue was determined in a verdict as follows: "We the jury find that Oscar D. Jones was generally insane, but capable of managing his business affairs on the 11th Dec., 1867, and on the 4th Dec., 1868."

The petitioner moved for a new trial upon various grounds, which in the view we have taken of the case need not be detailed. This motion was overruled and an appeal is now prosecuted to this court by the petitioner.

The petition, it will be seen, bears two aspects. It seeks to affect proceedings then being prosecuted in chancery by Caldwell & Morris, and it seeks also an inquiry into the alleged fact of lunacy. By the order of the Chancellor, even persons who had simply made contracts with the alleged lunatic were brought in by citation at the term of the court at which the issue was tried, while the issue tried embraces the fact of insanity upon two particular days. The petition is *ex parte*, is not entitled in the chancery cause pending, and no order under this petition could be made which could operate as an order in the chancery proceeding. It is not for this Court, when no portion of this record is before us to suggest the proper course to be pursued in that cause, or to suggest the method to call into question the effect of that decree, or to open the decree.

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The record brought to this court embraces no portion of the record in the chancery cause, and we cannot, nor could the Chancellor below in this proceeding, by an independent petition, make any order staying the cause in chancery. Therefore, so much of the orders made in this proceeding which are to operate directly in that cause, is irregular and unauthorized.

The only other branch of the case presented by this record, which we think it material to consider, is so much of it as purports to be an inquiry into the fact of lunacy. The verdict of the jury must be interpreted with reference to the issue they were to try. The issue here was as to the insanity of the party at two named periods of time; it did not embrace the question of general insanity. Their verdict is, that he was generally insane, but capable of managing his business at these dates. Such a verdict is inconsistent and absurd. Aside from this, however, this proceeding is entirely misconceived, and the petition must be dismissed. There is no such practice known to a court of equity. Such a matter as the insanity or lunacy of a party becomes the subject matter of investigation in a court of chancery in two ways. If it is alleged in an answer, or is pleaded as a matter of defence, an issue is usually directed to be framed, which may be, and usually is, sent to a court of law to be tried, but the court of law in cases of issues directed by the Chancellor never grants a new trial. This, if obtained at all, is obtained at the hands of the Chancellor after the record of the trial of the issue is returned to him. It may be also inquired into upon petition, addressed to the Chancellor, praying for a commission *de lunatico inquirendo*. The proceeding in the case now under consideration does not belong to the first class of cases, and is wanting in the essential requisites of the second. Barb. Ch'y Prac., 227. The second proceeding, when properly conducted, is upon an *ex parte* petition, and it is not required that persons who have had dealings with the party alleged to be a lunatic during the period of his

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alleged lunacy should be made parties, and where the proceeding is thus had, it is not conclusive upon their rights. Sir William Grant, Master of the Rolls, in *Hall vs. Warren*, 9 Ves., 609, says, "the inquisition taken in the absence of the party would not be conclusive upon him; it would be a *prima facie* evidence of lunacy, but it would be competent for third parties to dispute the fact and to maintain that notwithstanding the inquisition the object was of sound mind at any period of time which it covers." While this is so, it is also true that where the conveyance of a purchaser is overreached by the inquisition, or there is an interest under a contract with the lunatic, the party contracting with the lunatic has a right and the court must permit such purchaser of party to traverse the inquisition. Shelf on Lun., 115, 118, 121; 1 Coll., 172; 2 Barb. Ch'y Prac., 235; *ex parte Hall*, 7 Ves., 260; note to *ex parte Wragg*, 5 Ves., 452. An issue is sometimes more advisable than a traverse of the inquisition, as upon the trial of an issue the question may be gone into at large, whereas a traverse is confined to the facts found by the inquisition.

The object of the proceeding disclosed in this record is obviously to affect the decree in chancery. That must be done by a bill, not original, to be filed in that cause, or by some proceeding in that cause, or by an original bill. Whether it is essential first to issue a commission to inquire into the lunacy, we do not determine. The decree in the chancery cause cannot be controlled by an *ex parte* and independent petition of this character.

The case is remanded with directions to dismiss the petition.

City of Jacksonville vs. Dorman—Opinion of Court.

THE CITY OF JACKSONVILLE, APPELLANT, VS. RODNEY DORMAN, APPELLEE.

An order, made before the service of a summons to remove a cause to an adjoining circuit on account of the interest of the judge of the Circuit Court in which a complaint may be filed, is illegal, and does not confer jurisdiction upon the court to which the papers may be transmitted under such order.

Appeal from the Circuit Court for Columbia county.

A statement of the case, upon the points decided, is contained in the opinion of the court.

Sanderson & L'Engle for Appellant.

No appearance for Respondent.

RANDALL, C. J., delivered the opinion of the Court.

This is a suit for an injunction to restrain the city of Jacksonville from proceeding to remove certain buildings of plaintiff, which the city threatened to do for the purpose of straightening a street, and which proposed action of the city is alleged to be illegal.

After filing the complaint and before the service of summons, the plaintiff presented to the Judge of the Fourth Circuit a petition, alleging that the interest of the judge disqualified him from acting in the cause, and praying that the cause be transferred to the Circuit Court for Columbia county; and the judge, by an order, directed the removal of the cause to the Circuit Court for Columbia county, in the Third Circuit, as prayed. Thereupon the clerk of Duval transmitted the papers in the case to the clerk of Columbia county, and upon the papers being filed in the clerk's office in that county, the Judge of the Third Circuit allowed a writ of injunction on the 16th of August. The summons was issued on the 19th and served on the 20th.

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From the order allowing the injunction the defendant appeals, and insists:

1. That the order of the judge transferring the cause from the Fourth to the Third Circuit was irregular and illegal.
2. That the order for injunction made by the Judge of the Third Circuit was irregular and illegal.
3. That the complaint does not show sufficient ground for an injunction.

Section 53 of the Code of Procedure says: "An action is commenced, as to each defendant, when the summons is served on him," and section 78 reads: "Civil actions in the courts of record of this State shall commence by the service of a summons."

Manifestly, a suit is not pending until it has been commenced in some mode recognized by law.

The act providing for the removal of causes from one circuit to another on account of the disqualification of the judge, entitled "An act to provide for the more effectual administration of justice in the courts of this State," and the law found on page 333 of Thompson's Digest, relating to change of venue, are the only provisions under which the plaintiff can be supposed to have proceeded in this matter. These relate to the actual pendency of the suit. The order for the removal in this case was made before an action was commenced. It is claimed by the appellant that the order for the injunction was illegal and void, because no summons was served before granting the order. We do not so understand the law.

The order for injunction was made by the judge upon the complaint after the order and papers had been filed in the office of the clerk of Columbia county and before a summons was issued. The summons, upon its face, states that the complaint was filed in Duval Circuit Court and had been transferred by the order of the Judge of the Fourth Circuit to Columbia county, in the Third Circuit. There

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being no cause pending, the order of transfer carried no suit to the Third Circuit upon which the judge of that circuit could act.

The fourth section of the act of 1850 does not apply to this case, because in the contemplation of that section the cause must be pending in one circuit, and on account of the incapacity, &c., of the judge of that circuit, "the judge of any other circuit may hear and determine all matters which may be submitted to him," without changing the venue.

But there is another matter to which our attention is called by the appellant, which is, that by section 171 of the Code of Procedure, "*before granting* an injunction, the judge or court shall require a written undertaking on the part of the plaintiff, with or without sureties," to secure such damages as may be sustained by the party enjoined by reason of the injunction. No such security was required or given. An injunction would not *necessarily* be dissolved by reason of the inadvertent omission to give security, but the court would, in causes where equity seemed imperatively to require the continuance of the injunction, direct security to be given within a brief period, and on failure to give the security, dissolve it. This case does not seem to belong to that class, and moreover the respondent has failed to appear in this court. But the Circuit Court of Columbia county had not obtained jurisdiction of the cause, and the order for the issuing of an injunction, as from that court, cannot be sustained.

In the peculiar stage of this case, it would be improper to express any opinion upon the third point, involving the merits of the complaint.

The injunction is dissolved, and the order allowing the writ is vacated.

Bradford vs. Shine—Argument of Counsel.

RICHARD H. BRADFORD, APPELLANT, VS. RICHARD A. SHINE, ADMINISTRATOR, APPELLEE.

1. The Legislature may repeal a statute limiting the time for commencing civil actions, and thus deprive a party of the right to plead the statute as a defence.
2. The law provides that all debts and demands against the estate of any testator or intestate, which shall not be exhibited within two years after notice given to that effect by the executor or administrator, shall forever afterward be barred: *Held*, that the repeal of this statute, after the expiration of the time so limited, does not revive the right to prosecute the claim, nor deprive the representative of a deceased person of his right to plead the bar, the right of action being extinguished in such case.
3. The Constitutional Convention of 1865 ordained, and the ordinance was incorporated in the constitution, "that no law of this State providing that claims or demands against the estates of decedents shall be barred if not presented within two years, shall be considered as in force within this State between the 10th January, 1861, and the 25th October, 1865:" *Held*, that the convention of 1865 was called for the purpose of amending the constitution of the State to conform to the then existing political condition of the country, and not for purposes of general or special legislation, and that the provisions of such an ordinance could have no legal force.
4. The statute of December 12th, 1861, suspended the statute of limitations then in force "in relation to civil actions:" *Held*, that this suspension applied only to *civil actions*, according to the ordinary legal and popular signification and understanding of the terms, and did not apply to the presentation of claims against the estates of deceased persons.

Appeal from Leon Circuit Court.

A statement of the case is contained in the opinion of the court.

A. L. Woodward, Sr., for Appellant.

1. *Pleading and Practice*.—Judicial doctrines on the subject of special pleading, originating in the English system, cease to be authoritative when that system has been superseded or essentially modified.

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2. Where a demurrer is an implied admission of facts, on which it raises a question of law, the determination of that question is necessarily conclusive, for it would be absurd to proceed to the investigation of issues which the demurrer has absorbed.

3. Under our statutes, it is the *reserved right* of a party to resort to a trial, even of issues of facts, to which his demurrer had been addressed, after it has been overruled. Thomp. Dig., Title Pl., p. 331, sec. 7; Blount's Code Pl. and Pr., Act Jan., 1861, sec. 34.

4. If it were the object of the statute first cited to simplify the rules of special pleading and soften down the rigid and arbitrary rules of the common law, (1 Fla.,) then "*a multo fortiori*," does Blount's congenial Code exhibit the English system in a lively series of dissolving views.

5. A reargument has been applied for in this case because the cause was remanded, when it is said the judgment should have been in bar, as the plea of *plene administravit* was held good on demurrer.

By the common law, and by the earlier practice of this court, the judgment should have been in bar, but upon full consideration a different practice has been adopted as best comporting with a fair construction of our statute. 1 S. & M., 351.

6. Where a demurrer to a plea is overruled, it is error to render the judgment *final*—it should be *respondeat ouster*. 7 S. & M., 404, 408.

7. It is now the settled practice of this State that where a demurrer to a plea is overruled, the judgment of the court, instead of being *final* must be *respondeat ouster*, and when entered final by the court below, it will be reversed and remanded by this court. 12 S. & M., 439-44.

The question arising on the motion of the appellee is whether it is competent to an appellate court to enter an order *respondeat ouster*, on affirmance of the judgment of a Circuit Court overruling plaintiff's demurrer to defendant's

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plea in bar, or whether the judgment of the appellate court must necessarily be *final and conclusive*.

The answer to this question must be found in "practice best comporting with a fair construction of our statute."

R. B. Hilton on same side.

The statute set up as a bar to the plaintiff's suit was suspended by the act of December 13, 1861, (Pamph. Laws 1861, p. 18,) and has never been revived. Section 3 of that act reads as follows: "That the statutes of limitations now in force in this State, in relation to civil actions of every description, be and the same are hereby suspended," &c. The act in Thomp. Dig., p. 206, limiting the bringing of suits against executors and administrators, is clearly a statute of limitations—manifestly so regarded by the author of the digest, Judge Thompson, who, in framing his index, (see p. 656.) places *that act first* in the list of the statutes of limitations of this State. By referring to the appendix to Angell on Limitations, it will be seen that he too classes this among the Florida statutes of limitations, and in the same way classes all similar acts of other States.

So in all the books of reports and cases which I have been able to consult, statutes barring suits against estates, unless brought within certain limited time, are termed and treated as statutes of limitations. The cases on this point are too numerous for citation.

Judge Story, in *Prat et al. vs. Northam et al.*, 5 Macon, 95, says: "This *statute of limitations*, as to executors and administrators, is not created for their own security or benefit, but for the security and benefit of the estates which they represent." Thus this great judicial authority characterizes a statute like that on p. 206 Thomp., as a "statute of limitations." See 2 R. I., 196; 31 Mo., 260; 1 Denio, 159; 11 N. H., 208.

In some of these cases the distinction is drawn between the general statutes of limitations and these special statutes

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limiting the period of suits against estates, but all alike are treated as statutes of limitations.

Our own Supreme Court says, in so many words, that the statute limiting actions against executors and administrators "is virtually a *statute of limitations*." 3 Fla., 105.

Neither class of statutes extinguishes the debt. That no statute of limitation ever does. They simply, after the lapse of a certain time, if suit is not brought within that time, take away the remedy by closing the judicial tribunals to its prosecution. 18 Ala., 251; 2 Kansas, 156; 3 Kansas, 507; 13 East, 449; 17 Mass., 55.

Both classes of statutes in this State were suspended by the act of 1861, and still are.

But if the foregoing position be not tenable, then I rely upon the ordinance of 1865. It is, however, objected that this ordinance is invalid, because in conflict with the constitution of the United States. I ask, with what clause of that instrument is it in conflict? To this question in the court below there was no answer, other than that it is an attempt to impair vested right. I reply, "a debtor cannot be said to have a vested right to a mere statutory defence." 6 Pick., 501; 37 Vt., 605. And furthermore, "there can be no vested right to avoid the payment of a just debt." 2 Kansas.

If it be insisted that the ordinance is in conflict with the constitutional provision for the protection of contracts, I reply, in the language of Mr. Justice Washington in delivering the opinion of the Supreme Court in *Satterlee vs. Mathewson*, 2 Peters' 412, "It is not easy to see how a law which gives validity to a void contract can be said to impair the obligation of that contract."

But suppose it be granted that the operation of this ordinance is to impair *vested rights*, that does not bring it in conflict with the constitution of the United States. It has been repeatedly held by the Supreme Court that nothing in the constitution of the United States prevents a State from

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passing a valid law to divest rights which have been *vested* by law in an individual, because this was not a contract. 2 Peters, 412; 8 ib., 89, 540; 10 How., 375.

In the case of *Lencalle vs. Battell*, 6 Wend., 475, it was decided that a law of a foreign State, Denmark, authorizing proceedings calling on creditors to present their demands against a debtor by a specified day, and declaring the effect of omission to be not only to take away the remedy but to extinguish the debt, will be considered in the nature of a statute of limitations affecting the remedy and not the validity of the contract.

In *Satterlee vs. Mathewson*, the court says: "There is no part of the constitution of the United States which applies to laws divesting vested rights, nor any decision of this nor of any Circuit Court, which has condemned a law on that ground, provided its effect was not to impair the obligation of a contract."

The decision in *Bailey vs. The Trustees*, 11 Fla., was put upon the express ground that the act declared to be void violated the contract of the State.

The only laws which are unconstitutional because retrospective and retroractive, are *expost facto* laws, (which relate alone to crimes,) and laws impairing the validity of contracts. 1 Md. Chy.

The latter is a case in which it was held that a law which limited the defence in an action upon a usurious contract to the excessive interest was valid, although at the time the contract was made there was a law declaring such a contract absolutely void.

Having shown that the action of the convention is not impeachable for conflicting with the constitution of the United States, I come now to a brief inquiry as to the powers of that body generally.

"It may be affirmed that such a body is as almighty as the whole assembled people could be." 13 Law Reg., (N. S.,) 716. "It must be conceded that the people, convened

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and organized as a whole, and acting upon the fundamental principle that what the majority prescribe shall be law, could be under no restraint except that imposed by principles of natural justice." 32 Conn.; 14 Law Reg.,

In the matter of *Oliver Lee's Bank*, 7 Smith, 12, a case involving the powers of constitutional convention held in New York, the court says, (by Judge Denio:) "The convention was not obliged, like legislative bodies, to look carefully to the preservation of vested rights. It was competent to deal, subject to the constitution of the Federal government, with all private and social rights, and with all the existing laws and institutions of the State." * * "When, therefore, we are seeking for the true construction of a constitutional provision, we are constantly to bear in mind that its authors were not executing a delegated authority, limited by constitutional restraints, but are to look upon them as the founders of a State, intent only upon establishing such principles as seemed best calculated to produce good government and promote the public happiness at the expense of any and all institutions that might stand in their way."

"The Legislatures of the respective States, except as restrained by the constitution of the United States and of their own States have the same power as the Parliament of Great Britain." Redf. on Railways, 131; 1 Kent's Com., 448; 4 Wheat., 518.

What are the powers of the British Parliament, and what is meant when it is said in the books that a statute contrary to natural equity is void? 1 Kent, 447.

"The principle in the English government is that the Parliament is omnipotent." And though, says Chancellor Kent, this principle does not prevail in America, (with reference to legislative bodies,) yet if there be no constitutional objection to a statute, it is with us as absolute and uncontrollable as laws flowing from the sovereign power under any other form of government. 1 Kent, 448.

An ordinance appended by a constitutional convention to

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the constitution of the State is binding upon the executive, legislative and judicial departments of the government equally as if it had been incorporated into and formed a component part of the constitution. 15 Texas, 546.

Finally, the courts will not declare even a legislative enactment unconstitutional or void for light or trivial causes. This power, said Chief Justice Tighlman, (followed by the most illustrious jurists of America,) is a power of high responsibility, and not to be exercised but in cases free from doubt. (See Redfield on Railways, 548, n.) With even much more emphasis might the same thing be said where a court is called upon to pronounce unconstitutional and void an ordinance regularly passed by a sovereign convention of the people of the State.

Papy & Peeler for Appellee.

The question for the adjudication of the court arises upon the demurrer of the plaintiff to the plea of the statute of non-claim interposed by the defendant. It is maintained for the defendant that when the statute of non-claim has run a complete bar to the right of a creditor, and the rights of heirs and distributees have become vested under its operation, a subsequent repeal of the statute cannot revive the obligation which has thus become extinguished. Rights once vested cannot afterwards be divested by subsequent legislation, any more than property can be arbitrarily taken from one and given to another. The effect of the statute of non-claim is to bar the right and not to suspend the remedy; for, in the first case, no subsequent promise can revive the right of recovery, because the rights of the heirs have become vested in the property; whereas, in the latter case, when the remedy is only suspended, it may be revived by subsequent promise. The statute of non-claim, though in one sense a statute of limitations, is not what is commonly understood as a statute of limitations, which bars only the remedy. In the one case, the right is barred and rights be-



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come vested in other parties, to-wit: the heirs; whereas, in the other, the remedy is suspended, the obligation remaining in the party who by subsequent promise may revive the remedy, no other rights vested in other persons being thereby affected. When the statute of non-claim has run a complete bar, the heirs become entitled of right to the property, and the duty of the administrator is to deliver it to them, and no subsequent promise of his can deprive them of this right, much less can it be, that after he has distributed the estate, a subsequent repeal of the law can legally be permitted to divest them of that of which they had become completely vested. To allow this would upset all settlements that have been made under the provisions of existing laws.

Rights *once vested*, privileges once granted or sanctioned by the law of the State, if within constitutional limits, may be forfeited, but cannot be arbitrarily divested by future legislation. 3 Pike, (Ark.) 302, 305.

It is repugnant to every principle of justice to take by law the property of one and give it to another by arbitrary rules. Blackstone treats it as a settled rule that all laws are to commence in future, and to operate prospectively; and even in England, where the Parliament is almost omnipotent, Lord Coke says: "Their acts will be construed that no man who is innocent or free from wrong or injury shall by a literal interpretation be punished or *endangered*." The above doctrine is recognized in all English and American courts. 3 Pike, 305.

"If the Legislature can *increase* or in any way *change the responsibility* of a party, may they not with equal justice declare that certain property belongs not to one man, but to another?" 3 Pike, 306.

A statute that divests *vested rights*, that violates contracts, or that assumes to control or exercise judicial powers, is unconstitutional and void. 11 Ohio, 609.

The Legislature has no power, as has been repeatedly held,

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to interfere with vested rights. To give property of A to B, is clearly beyond legislative authority. 6 Harris, (Penn.) 111.

Cooley on Constitutional Limitations, page 365, says: "When the period prescribed by statute has already run so as to extinguish a claim which one might have to property in the possession of another, the title to the property, irrespective of the original right, will be regarded as vested in the possessor, so as to entitle him to the same protection that the owner is entitled to in other cases. *A subsequent repeal of the limitation law could not be given a retroactive effect so as to disturb this title.*" The right being gone, the remedy fell with it, and as there could be no remedy without a corresponding right, it was useless for the Legislature to restore the former so long as it was prohibited by the constitution from interfering or meddling with the latter, that is, the right. The right being gone, there could be no remedy. Cooley cites a number of cases, viz: 5 Cranch, 358; 15 Wis., 532; 43 Penn., 512; 2 Black., 399; 3 Kan., 507. So here the claim is extinguished by the statute's bar. It is *gone*, and being gone, there could be no remedy. The right of the heirs became *vested*, and hence the subsequent statute or ordinance could not rightfully divest him. Sedgwick on Constitutional Law, page 410, is similar to the above.

The Legislature have the power to take away by statute what was given by statute, but not so as to disturb *rights already vested* under the former law. 6 Shep., 109.

The repeal of a statute cannot divest any right already vested under it. 2 Stewart, 160.

A claim against the estate of a deceased person once barred, is cut off entirely. 6 Foster, 497.

The ordinance of the convention of 1865 did not repeal the statute of non-claim. It merely, in effect, suspended its operation with respect to claims against which the statute of non-claim had not run a complete bar.

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WESTCOTT, J., having been of counsel in the case, did not sit.

RANDALL, C. J., delivered the opinion of the Court.

In June, 1866, Richard H. Bradford, appellant, commenced an action in the Circuit Court for Leon county against the respondent upon a promissory note, executed by Richard A. Shine, (since deceased,) dated December 28, 1861, at Tallahassee, in said county, payable one day after date to R. H. Bradford, or order, for seven hundred and twenty-eight dollars, with interest at eight per cent. per annum.

The defendant pleaded the general issue, and for further plea, says that according to the requirements of the statute in such case, he published a notice in a newspaper published in the county of Leon for the time required by law, notifying all persons having claims and demands against the estate of R. A. Shine, deceased, to present the same within two years from the date thereof, or the said notice would be pleaded in bar of their recovery, and that the plaintiff did not present his claim within two years from the publication of said notice, according to the requirement of the law and the notice aforesaid.

To this plea, on the 12th May, 1869, the plaintiff demurred on the ground that by an ordinance of the Constitutional Convention of the people of Florida, held on the 25th October, 1865, it was ordained as and for the fundamental law of this State, "that no law of this State providing that claims or demands against the state of decedents shall be barred if not presented within two years, shall be considered as in force within this State between the 10th January, 1861, and the 25th October, 1865," and the plaintiff avers that the two years set forth in said defendant's plea as barring the plaintiff's claim, were a portion of the time between the said 10th day of January, 1861, and the 25th day of October, 1865. And afterwards, the plaintiff filed his further demurrer, showing "that the statute in said plea mentioned

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is no longer of force and effect in this State, the same having been repealed by act of the Legislature of Florida, approved December 13, A. D. 1861, and not since that day enacted."

These causes of demurrer were overruled, and the plea held sufficient in law to bar the plaintiff's action against the defendant, whereupon judgment was rendered for the defendant, from which judgment the plaintiff appealed.

The appellant assigns for errors in the case the following:

1. The Circuit Court erred in overruling the plaintiff's demurrer to the defendant's plea.

2. The court erred in failing to sustain the plaintiff's demurrer to defendant's plea in this, that the court, in thus overruling and failing to sustain the demurrer, in effect decided against the validity of the seventh section of the schedule and ordinance of the constitution of 1865, retrospectively suspending the operation of the statute of non-claim, and said court, by its action, disregarded the statute of December 13, 1861, expressly suspending the statutes of limitations generally, both of which are distinctly assigned for error.

3. That the court erred in giving judgment for the defendant upon the pleadings.

4. That on the whole case, the law is with the appellants.

It was claimed in the argument, on the part of the appellant, "that it is difficult upon any general principles to limit the omnipotence of the sovereign legislative power by judicial interposition, except so far as the express words of a written constitution give that authority," and that "there is nothing in the constitution of the United States which forbids a State Legislature from exercising judicial functions, nor from divesting vested rights vested by law in an individual, provided its effect be not to impair the obligation of a contract;" that "the aggregate community is sovereign, is the original source of authority and acknowledged depository of public power, ultimate and absolute; that the con-

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stitution of a State is the fiat of sovereignty, above judicial criticism, unless it conflicts with that of the United States, which it is the duty of the judiciary to determine," and that it was within the power of the Constitutional Convention of 1865 to have annulled perfect rights.

And it was also claimed that a statute of limitations, though it may at one time constitute a perfect right of defence against a civil action, may be abrogated or suspended so as to take away that right, there being no such thing as a vested right in a mere statutory defence against the payment of a debt.

Many authorities are referred to in which the courts of the United States have held that there is nothing in the constitution of the United States which prevents a State from passing a valid law to divest rights which have become vested by law, and it is not questioned that the courts of the United States very uniformly decline to adjudicate questions arising solely under the laws of the States where constructions have been given to them by the courts of the States—thus treating the interpretation as given by the State courts as rules of interpretation for the Federal courts, even though these courts, as an original proposition, might have adopted a different conclusion. The refusal, therefore, of the Federal courts to reverse the decisions and constructions of the State courts, is merely a refusal to intermeddle, which might introduce unnecessary confusion, and not a direct affirmance of the correctness of a rule or interpretation of a State law as made by the State tribunals.

It is said that the Supreme Court of the United States has held that a law of a State may be upheld, which may even set aside a decree of a State court and grant a new trial after the expiration of the time for taking an appeal has passed; and reference is made to the case of *Calder and Wife vs. Bull*, 3 Dallas, 386. The State Legislature of Connecticut, by law or resolution, set aside a decree of the Judge of Probate for Hartford, which decree disapproved

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of a will, and granted a new hearing, which was had, and on appeal to the Supreme Court of Connecticut the judgment, upon the new hearing, was affirmed. The case was then taken to the Supreme Court of the United States, upon the ground that the act of the Legislature of Connecticut was an *ex post facto* law. By the existing law of that State, it was said a right to recover certain property had vested in Calder and Wife, the appellants, in consequence of a decision of a court of justice; but in virtue of the subsequent resolution of the Legislature and the new hearing and decision, this right to recover was divested, and the right of property declared to be in Bull, the appellee. The Supreme Court defines the meaning of the phrase *ex post facto*, and say that in its origin and universal application, it refers to laws affecting penalties by making that act an offence which was not an offence when the act was committed, or which prescribes an aggravated punishment for a crime committed, &c., and the court says that this case is not within the inhibition of the constitution of the United States. Justice Chase, in his opinion, says: "Without giving an opinion at this time, whether this court has jurisdiction to decide that any law made by Congress, contrary to the constitution of the United States, is void. I am fully satisfied that *this court has no jurisdiction* to determine that any law of any State Legislature, contrary to the constitution of the State, is void. Further, if this court had such jurisdiction, yet it does not appear to me that the resolution or law in question is contrary to the charter of Connecticut or its constitution, which is said to be composed of its charter, acts of Assembly, and usages and customs. I should think that the courts of Connecticut are the proper tribunals to decide whether laws contrary to the constitution thereof are void." "Whether the Legislature of any of the States can revise and correct by law a decision of its courts of justice, although not prohibited by the constitution of the State, is a question of very great importance, and not necessary now

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to be determined. I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without control, although its authority should not be expressly restrained by the constitution or fundamental law of the State."

Paterson, Justice, and Iredell, Justice, in the same case show that "the constitution of Connecticut is made up of usages, and it appears that its Legislature have from the beginning exercised the power of granting new trials. * * They have acted in a double capacity, as a house of legislation, with undefined authority, and as a court of judicature in certain exigencies," and they have from time to time exercised all executive, legislative and judicial authority, and have distributed the two latter as they thought proper. "It may indeed appear strange to some of us, that in any form there should exist a power to grant, with respect to suits depending or adjudged, new rights of trial, new privileges of proceeding not previously recognized and regulated by positive institutions; but such is the established usage of Connecticut, and it is obviously consistent with the general superintending authority of her Legislature." The Supreme Court of the United States, therefore, declined to interfere, because no question arose under the constitution of the United States, but the justices show fully that the Legislature of the State of Connecticut acted within its recognized judicial province in granting new trials and appeals, while they characterize such acts as "strange" in connection with the powers of a purely legislative body.

In the case of *Warren vs. Sherman*, 5 Texas, 441, the court says: "The clause in the constitution, if susceptible of a different interpretation, cannot be construed to divest or annul perfect rights which, by operations of and in conformity with the laws, had vested in the defendants; to have annulled perfect rights was, beyond doubt, within the powers of the convention." That suit was brought by the appellant for the recovery of lands, the original certificate issued by the Board of Land Commissioners of San Augus-

time county, and located and surveyed on the land in controversy, was not approved as a genuine claim against the government by the traveling Board of Commissioners, under the act to detect fraudulent certificates, &c.; nor was a suit instituted for its re-establishment previous to January 1, 1844, beyond which time an act of 1843 declared that suits for the establishment of certificates not so approved should not be commenced. The land was afterwards located and surveyed by virtue of the certificate, which is the foundation of the defendant's title, and a patent was issued on the 10th of February, 1846. The plaintiff afterwards, under the provisions of the constitution, opening courts for that purpose, sued for the re-establishment of his certificate, and obtained judgment therefor in 1847. The circuit court, upon these facts, charged the jury "that the plaintiff having failed to commence suit for the re-establishment of his certificate before the first of January, 1844, the land became vacant and subject to location; and the defendant's rights, under a patent issued subsequent to that period, and previous to the confirmation of the plaintiff's certificates, and the re-opening of the courts, *cannot be divested by such confirmation.*" And the Supreme Court in this case approved and affirmed the charge of the Judge, and the verdict and judgment in pursuance of it. And the suggestion of the court in the brief sentence quoted, that "to have annulled perfect rights was beyond doubt within the powers of the convention," had reference to the particular case in which two grants had emanated from the government; and it was inevitable that one or the other of them must prevail, and that the sovereign power might, by its fiat, divest one "perfect right" by recognizing another equally "perfect," the former having been subjected to forfeiture by the legislative act of limitation and the peculiar necessities of the case. "Nor is there any principle, or rule of law or equity, (says the same court, under which this confirmation could have

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had retroactive operation so as to clothe the plaintiff with the superior equity to the land."

The principle, that a legislature or a convention may annul perfect rights, is well shown in the case of Cochran and Wife vs. Van Surlay, 20 Wendell, 365, in holding that "a *private act* of the legislature, authorizing the sale of the real estate of infants for their maintenance and education, is within the scope of the legitimate authority of the State Legislature." There can perhaps be no stronger illustration of the doctrine contended for. There was an absolute destruction of a vested title in lands under the authority of an act of the Legislature, passed with reference to the particular case. Nor can it be said, that in authorizing the divestiture of a title to land through the instrumentality of the courts, any one is "deprived of life, liberty or property without due process of law," that is, by mere arbitrary legislation. Upon examination of the case cited, in 15 Texas, Stewart et al. vs. Crosby, Commissioner, &c., we find the court merely say that they think it free from doubt that the ordinance appended to the constitution is a part of the fundamental law. Having been framed by the convention that framed the constitution, and adopted by the convention *and the people* along with the constitution, it is of equal authority and binding force upon the Legislative, Executive and Judicial Departments of the Government of the State as if it had been incorporated in the constitution, forming a component part of it. The suit was brought by the appellants as trustees of the Texas Emigration and Land Company to restrain the Commissioner from issuing patents to persons generally, who had made locations within the limits of the colony of said company, and particularly to certain persons named, and doubtless referred to, and determined the effect of the ordinance, (the provisions of which are not given in the report of the case,) upon the *inchoate* rights of persons who had contracted with the company for portions of the public lands of the State.

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The case of *Drehman vs. Stifel*, 41 Missouri, 184, is cited as a strong case supporting the power of a convention to abrogate rights which have become fixed or vested. The plaintiff in the case owned a brewery near St. Louis, which was torn down by the defendant in 1861, under the orders of General Lyon, an officer of the United States in command of the department of Missouri, for the purpose of making a parade ground upon the premises, and for other military purposes, and afterwards the premises were occupied for those purposes. The plaintiff brought his suit to recover damages; the defendant pleaded an ordinance of the convention of 1865, incorporated in the constitution, which forbids the prosecution of all civil actions or criminal proceedings against any one for acts done after January 1, 1861, in pursuance of military authority, vested in him by the Government of the United States, or of that State, and providing, "that if any action or proceeding shall have hereafter been, or shall hereafter be instituted against any person for the doing of any such act, the defendant may plead this section in bar thereof."

The Court supported the plea on the grounds that the Constitution of the United States does not prohibit a State from enacting retrospective laws or ordinances of a civil nature which take away a right of action, or divest rights invested in an individual, if these laws do not impair the obligation of a contract nor divest *settled rights of property*, and that the constitutional ordinance is an act of indemnity and oblivion and pardon; of indemnity so far as it affects civil actions, and oblivion as it affects criminal proceedings, and not inconsistent with the Bill of Rights; and that the Government and not the officer was responsible for property taken for public use or destroyed by military authority. That it changes a rule of evidence, and makes that a jurisdiction and a defence which would not have been such before; in other words, it extends to a party a right of defence at law,

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which by all principles of equity and justice he ought to have, against the consequences of an act which he performs at the instance of the government, founded in a necessity of the government and into which the motives of the government alone and not the individual volition entered as the primary occasion and for the supposed public good. We cannot discover that in that case the constitutional ordinance is invested with any greater legal force or validity than would follow an enactment of the legislative branch of the government in like cases, except that as it is incorporated in the constitution, it has become more permanent as a law by being thus placed beyond the reach of the legislature to alter or repeal it according to the whim of any party which might afterwards be in temporary ascendancy in the State. While we admit that the Legislature by the repeal of a statute of limitations may take away the right to interpose the statute as a defence, we "cannot subscribe to the doctrine contended for that the legislative power is omnipotent for all purposes, even though it be not restrained by express constitutional limitation." This subject has been the theme of vast volumes of discussion, but the judicial opinion of this country has, since the independence of the American Colonies, been borne, by its natural tendencies co-operating with the political character of our institutions in the same direction, toward the conclusion that no government should possess the ultimate, irrefragible power to take away the vested rights of property, and by an arbitrary act of legislation to depose one from his estate lawfully acquired, and pass it to another, and this, whether this legislative act emanated from the legislation under an organized government, or from a popular Convention assembled for the purpose, expressing the wishes of the whole people in forming a constitution of government, either upon the ruins of a former one, or in creating one where none had before existed; and however the military power may have divested or created rights by the decrees of force, or into whatever confusion the affairs

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of men may have been thrown by popular tumult, if there can be found a safe guide and a sure foundation upon which the sacred rights of individuals may rest secure, it is the duty and the high province of the judicial tribunals, so far as in them lies, to mete justice without violating these rights and in accordance with established principles of law and the common principles of justice.

It is true that the people in their sovereign capacity may establish rules of property, but they should not, so long as the safety and happiness of the whole may be preserved and secured without it, make any rule that may work injustice and wrong to the humblest or weakest; and when an enactment even in the fundamental law of the State has this inevitable tendency, it may be the duty of the judicial department, if possible, to declare such a law inoperative, as inconsistent with and contrary to the spirit and design of the whole structure.

With this premise, we will look at the origin of the constitution of 1865: A government of laws had existed for years in this State, under which property had been acquired, and certain rules had been established for its acquisition, and laws had been in force which protected men in their right of property, provided for the enforcement of contracts, and among others, established certain statutes of repose or limitation of time for enforcing certain rights. This government by means of certain political convulsions became ultimately disorganized in its political aspects, without, however, destroying the common rights and duties of the citizens, or the commercial relations of the people among themselves. Under a quasi military proclamation of the President of the United States, dated July 13, 1865, he appointed William Marvin as "Provisional Governor of this State, whose duty it shall be, at the earliest practicable period, to prescribe such rules and regulations as may be necessary and proper for convening a convention composed of delegates to be chosen by that portion of the people of said State who are loyal to the

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United States and no others, for the purpose of altering or amending the constitution thereof, and with authority to exercise within the limits of said State all the powers necessary and proper to enable such loyal people of the State of Florida to restore said State to its constitutional relations to the Federal government, and to present such a republican form of State government as will entitle the State to the guarantee of the United States therefor, and its people to protection by the United States against invasion, insurrections and domestic violence.”

Under this proclamation, Provisional Governor Marvin ordered an election to be held October 10th, for delegates to a convention. Whatever may have been the rightful authority or the legal force of this proceeding, it is certain that the authority and power of the convention so elected was limited to that delegated by the power which created and called it into being.

The election was held and the delegates elected assembled at the capital on the 25th October, 1865, for the purpose specified, which included the altering or amending of the former constitution of the State, conforming it to the exigencies of the times in their political aspects.

This convention was not called in pursuance of the constitution of 1838, commonly known as the St. Joseph's constitution; for that constitution provided that “no convention of the people shall be called, unless by the concurrence of two-thirds of each House of the General Assembly,” and that constitution should not be altered except by bill, to be passed by two-thirds of each House of the General Assembly at two sessions of that body.

Whatever was the authority of the convention of 1865, it was limited, as before remarked, to the alteration of the former constitution in such manner only as to enable the State to be restored to its proper relations to the Union. Beyond this it had no power or agency, and beyond this, any action of the convention, unless subsequently ratified

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by a vote of the people, was not binding upon the people. The functions of the convention were confined to the objects for which it was elected, the presentation of an amended constitution, having reference to the declaration of certain general principles and rules of government, and providing for the organization thereof by the election of the necessary officers, and among other things the organization of the legislative department, to whom the ordinary matters of legislation should be confided. It was not authorized to enter upon a general system of legislation, and its members when elected were not expected to annul general or special laws in existence which had been enacted in a regular and constitutional manner, and which were not repugnant to the general principles of Republican government.

In 1832, the legislature of South Carolina passed an act to provide for the call of a convention of the people of that State, "to take into consideration the several acts of Congress of the United States imposing duties on foreign imports, for the protection of domestic manufacturers, and for other unauthorized objects," and "also other laws and acts of the government of the United States which shall be passed or done," &c.

A convention accordingly assembled and passed an ordinance to nullify certain acts of Congress. The Congress having afterwards modified the legislation referred to, the convention again assembled and repealed their former ordinance, but adopted another, declaring that the allegiance of the citizens of the State is due to the said State; and that obedience only, and not allegiance, is due by them to any other power or authority to whom a control over them has been or may be delegated by the State, and authorized the General Assembly of the State to prescribe oaths of office as should bind the officers of the State to the observance of such allegiance, and abjuring all other allegiance. The legislature subsequently passed an act prescribing an oath to be

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taken by every militia officer, in accordance with the ordinance of the convention.

In two cases which afterwards arose involving the authority of the convention and the validity of this act of the legislature, the State vs. Hunt, and the State vs. McMeekin, 2 Hill, p. 222, O'Neill, J., says, "In one point of view, a convention may be illimitable. It is, however, then a revolutionary, and not a constitutional convention. It is one which assembles to resolve society into its elements, and to which the people necessarily give all power. * * * * A convention assembling under the constitution is only the people for the purposes for which it assembles, and if they exceed these purposes, their act is void, unless it is submitted to the people and affirmed by them. It is true the legislature cannot limit the convention, but if the people elect them for the purpose of doing a specific act or duty pointed out by the act of the legislature, the act would define their powers, for the people elect in reference to that and nothing else." "The people elected delegates in reference to this call; it was not contemplated that they should do any act which was not necessary to give effect to the object and purpose of the people. * * * Here ended their power."

All the judges delivered opinions at great length, agreeing upon the general proposition that the power of the convention was limited to the matters submitted to them, and that beyond this no ordinance of the convention was of binding force until it should be ratified by the people.

The constitution of 1865 was not submitted to and ratified by the people, but, until the adoption of another constitution through the forms of law, it remained a general framework of "Provisional Government," having legal vitality only so far as was found necessary to restore civil order and enforce the laws already in existence, not incompatible with the purposes of its creation. We do not discover that the passage or the suspension of limitation laws, or that the ordinary functions of a legislative body were contemplated by

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the authority which invited the people to meet in convention through their delegates, or that in the election of delegates they had any such object in view. And we think the remarks of the South Carolina judges in the cases alluded to, upon the subject of the effect of an ordinance of this character, are based upon the solid foundations and correct theory of republican government. Our conclusion, therefore, is that section 7 of Article XVI, "Schedule and Ordinance," of the constitution of 1865, is not operative to suspend or repeal the laws of this State, which barred claims or demands against the estates of decedents if not presented within two years as provided by statute.

Without, therefore, determining the interesting questions which were so ably and forcibly presented by the respective counsel for the appellant, as to the omnipotence of the legislature in reference to the question presented, we will briefly consider by way of illustration what may have been the effect of the enforcement of the ordinance.

The facts as presented by the pleadings are, that the maker of the note died, and his administrator proceeded to administer and published the notice to creditors, and that two years elapsed, whereby in the language of the statute, the *claim was barred*.

The presumption is, though it is immaterial as affecting the principle, that at the expiration of that time the estate was distributed, if any remained after paying debts, and it may be that the estate was all absorbed in liquidating the claims of creditors of the deceased. What then would be the effect of the retroactive suspension of the statute of non-claim? The plaintiff would have judgment against the administrator and would be entitled to a *pro rata* amount upon his judgment equal to that apportioned to other creditors. Those creditors could not be required to refund from time to time as claims might be presented like that here sued for, and the administrator could not avoid the *pro rata* payment upon the judgments so recovered, because this ordinance be-

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ing enforced, the statute would afford him or his sureties no defence. But it may be answered, the administrator and his sureties might have their relief in the court of chancery against this gross injustice. To which it may be replied, the court of chancery could not afford the supposed relief, because that court is bound by the laws of the State equally with the courts of law, and neither can disregard a positive statute. The court of chancery could not, then, without disregarding the ordinance, afford the proposed relief, and must consider that the statute of non-claim was not in force, and that the administrator had distributed the estate without authority of law, thereby creating a liability against him and his sureties which did not before exist.

And further, in relation to the character of the statute of non-claim. It is a statute of limitation, but unlike the ordinary statutes limiting the time of commencing civil actions, its language is, that at the expiration of the time limited the claim is "barred." "A claim against the estate of a deceased person once barred is cut off entirely, since no person has either power or right to revive it by a new promise or in any other mode." *Brown vs. Leavitt*, 6 Foster, N. H., p. 497. We think this view of the Supreme Court of New Hampshire is a correct one, but without further consideration, we will not say that it is a final conclusion as against any proper action of the sovereign power.

It was urged that the provisions of section 3 of the act of Dec. 13, 1861, entitled an act providing for the stay of executions in this State, suspending the statute of limitations then in force "in relation to civil actions," in effect suspended the statute of non-claim. We cannot agree to this, because the statute of 1861 refers only to the law limiting the time for commencing *civil actions*, and must be construed with reference to the commencement of ordinary civil actions, according to the legal and popular understanding of the terms used. The convention of 1865 evidently took the same view of it, otherwise they doubtless would not have

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attempted to declare the statute of non-claim suspended. Had they considered that the act of 1861 affected the presentation of claims to an administrator, they would at most have given that interpretation to the act of 1861.

We are therefore constrained to hold that the defendant's plea set out a valid defence to the action, and that the judgment of the Circuit Court must be affirmed.

 ADAM MCNEALY, APPELLANT, vs. JASON GREGORY, APPELLEE.

1. The courts of this State derive their jurisdiction from the State constitution. They cannot assume jurisdiction not granted, or which is denied, although the effect may be that the obligation of a contract cannot be enforced. The jurisdiction of the courts is no part of the obligation of a contract. The last clause of section 28, article xvi. of the constitution, provides that "all judgments and decrees rendered in any of the courts of this State since the 10th day of January, A. D. 1861, upon all deeds or bills of sale, or upon any bond, bill, note, or other evidence of debt, based upon the sale or purchase of slaves, are hereby declared set aside, and the plea of failure of consideration shall be held a good defence in all actions to said suit." *Held,*
2. That this action is legislative, not judicial; that it prescribes a rule for the action of the courts in reference to a particular class of judgments upon their records; that it is a law operating retrospectively upon the contract; that its effect is to make that which was a good consideration for a contract, at the time and place it was entered into, not a good consideration; that this is to destroy the obligation of the contract, and it is therefore void. The abolition of slavery or the emancipation of the slave does not destroy the right of action which a vendor of the slave so emancipated has against the vendee, who owned the slave at the time of his emancipation, and any action of a convention of this character, which directs the courts to hold otherwise, is void, as it impairs the obligation of the contract.
3. If the purpose of the convention in this clause was to destroy all the right of the plaintiff in execution in this judgment, as a punishment for

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making this species of property the subject of sale, or for any other act, then, viewed in this aspect, it becomes a bill of pains and penalties, and is void.

4. If it is regarded as the exercise of judicial power by the convention, the result of which is to set aside the judgment, then it is the exercise of a power by the delegate which had not been conferred, and the delegate possessed no inherent power of the character here exercised; nor could such an act become valid by receiving the sanction of a majority vote of the people. A citizen of the United States, in time of peace, has a right, under the constitution of the United States, to have his rights to property made the subject of adjudication and investigation by no other tribunal than one which is a part of a government republican in form, such as a court of the United States, or of a State, where the judicial powers of government are confided to a recognized judicial department, controlled in their judgments by the law of the land; nor can the people, by a simple majority vote, give validity to the void act of a body of delegates which deprives the citizen of his property without due process of law.

- Appeal from a judgment rendered in the Circuit Court for Calhoun county.

In March, A. D. 1866, Adam McNealy brought an action of assumpsit against Jason Gregory, in the Circuit Court of Calhoun county, upon a promissory note of Gregory, payable to A. H. Bush, or bearer. Certain pleas, raising questions in reference to the interest of the plaintiff in the note, were filed. No plea was filed setting up the fact that the consideration of the note was the price and value of a slave sold by the payee of the note (Bush) to the maker, Gregory. McNealy obtained a judgment on the 25th of October, A. D. 1866, and execution issued thereon. This judgment was reviewed by this court upon a writ of error at January term, A. D. 1869. It was affirmed and the case remanded, (12 Fla., 579.) At the October term, A. D. 1869, of the Circuit Court for Calhoun county, and after the mandate from this court had reached that court, Gregory, the defendant in execution, filed his petition in the Circuit Court, alleging that in *March, A. D. 1860*, he purchased a slave of Allen H. Bush, to whom he gave a promissory note for the price agreed upon; that Bush transferred the note to Adam

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McNealy, and that the note upon which the said judgment of the 25th of October, A. D. 1866, was based, was this note so given for a slave. Upon the filing of this petition, and without notice to the plaintiff in execution, an order was made setting aside the judgment, reinstating the case, and giving the defendant liberty to plead the matter of the consideration of the note, as well as directing the sheriff to return the execution then in his hands to the clerk's office, and to suspend proceedings thereon. Gregory then interposed a plea, alleging that the note was given for a slave. At a subsequent term, a motion of the plaintiff to set aside this order as being made without notice or an opportunity for hearing, was denied, whereupon a demurrer to the plea was interposed and overruled. Plaintiff, excepting to the ruling of the court upon the demurrer, there rested his case. A final judgment for the defendant was then entered. This judgment was peculiar. It declared both the facts and the law of the case. It recites that the note upon which the action was brought was given for a slave; that the constitution declared that no action should be maintained thereon. It then directs the suit to be dismissed for want of *jurisdiction* to hear and determine the same; that the plaintiff take nothing by his action, and that the defendant recover fifty-one dollars for his costs in this behalf expended. The plaintiff now prosecutes an appeal to this court, and asks this court to declare that the original judgment is still valid, and to set aside all of these proceedings.

The section in the constitution of this State under which these proceedings were had, is section 26 of article xvi., and is as follows:

"It shall be the duty of the courts to consider that there is a failure of consideration, and it shall be so held by the courts of this State, upon all deeds or bills of sale given for slaves, with covenant or warranty of title or soundness, or both; upon all bills, bonds, notes, or other evidences of debt given for or in consideration of slaves which are now out-

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standing and unpaid, and no action shall be maintained thereon; and all judgments and decrees rendered in any of the courts of this State since the 10th day of January, A. D. 1861, upon all deeds or bills of sale, or upon any bond, bill, note, or other evidence of debt based upon the sale or purchase of slaves, are hereby declared set aside, and the plea of failure of consideration shall be held a good defence in all actions to said suit; and when money was due previous to the 10th day of January, A. D. 1861, and slaves were given in consideration for such money, there shall be deemed a failure of consideration for the debt; *provided*, that settlements and compromises of such transactions made by the parties thereto shall be respected."

Geo. S. Hawkins and A. H. Bush for Appellant.

Geo. S. Hawkins for Appellant.

I contend, first, that the 26th section of the 16th article of the constitution of Florida is in conflict with the 10th article of the constitution of the United States; second, that the original contract was legal at the time of its creation, and is so now; third, that the remedy upon the contract was legally enforced by our laws, and that the Florida convention had no right or power to take it away by legislation, and that in so doing it was an usurpation of authority, and was the exercise of political power.

The note upon which said suit was brought was given for a negro slave, at the date of the contract recognized as *property* by every legal tribunal in the United States before whom the question came, and by all the political departments of the government.

I say that the action of the convention "impaired the obligation of the contract," and thereby is in conflict with the constitution of the United States.

The definition of a contract is familiar to all, but I cite a paragraph from Pothier, (Evans' ed., p. 2, sec. 1 :) "A civil

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obligation is a legal tie, *vinculum juris*, which gives the person in whose favor it is contracted the right of judicially enforcing the performance of it."

The remedy or action of the court upon contracts enters into and forms an essential part of them. It may be superfluous to cite authorities upon so generally received a doctrine, but I call the attention of the court to the following: 2 How., (U. S.,) 669; 4 Wheat., 197; 12 Wheat., where the court says, in speaking of *obligation*, it is a legal and not a *moral* obligation. It is the law which binds the party to perform his obligation. 15 How., 319; 1 ib., 332; 4 Littell; 3 Black. Com., 23; 1 Kent, 419; 3 Story on Const., secs. 1379, 1371-2; 4 Wallace, (U. S. R.,) where the court collects all the authorities; 9 Barb., 482.

The contract, having been originally legal, is it legal now? (See Smith on Contracts, 69, n. 9, citing 9 Meeson & Welsby, 643.) A State is bound to furnish a remedy for the enforcement of every right of the citizen. 8 S. & M., 58.

Nothing transpired to affect its validity until the action of the convention. It certainly received no taint of illegality owing to any events of the war, or since the 11th of January, 1861. There was temporarily a change of government—a usurpation of the sovereign power of the United States within certain limits, and within those limits there was a government *de facto*—a government possessing all the attributes of sovereignty, and recognized as such by all the political departments of the United States government. Upon this question the judiciary follow the action of the government. 7 Wheat., 336-7. At the close of the contest we may have been considered a conquered country. In such an event, there are no changes in the rights of property, or the civil relations of the people in the conquered territory. 1 Kent, 178, 186, (9th ed.,) citing 5 Robinson, 106; 7 Peters, 51; 9 ib., 711, 734, 749; 12 ib., 410, 438; 20 How., 176; Hale's History of the Com. Law, Pref., 14.

Judicial decisions remain undisturbed. Grotius, b. 1, ch.

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4, sec. 20; Book 2, ch. 13, sec. 11; 1 Story on Const., secs. 214, 215; 3 ib., sec. 1318.

The United States government, the conquering party, has not altered or changed the rights of property in Florida, and no other power can do so.

After the war, our State government existed at the will and by the tolerance of the United States government, and there were no changes in our judiciary system, or interference with our laws, contracts or civil relations.

By virtue of the reconstruction acts, we were permitted to enter the Union. When we did so, we went in as the peer of all the States, with all the powers of State sovereignty, with authority to make and pass laws; *but all laws*, whether made by the *Legislature proper*, or the *Convention*, to be subject and subordinate to the constitution of the United States.

The ordinances or decrees of a convention possess no special sanctity. All legislation is but the declaration of the sovereign will, but when it is that of a State, and in conflict with the constitution of the United States, it is simply void.

We have been compared to Texas when she entered the Union. The cases are not parallel. The ordinances of Texas were passed before the constitution of the United States applied to them. 11 How., 185; 14 ib., 79.

The constitution of the United States was applicable to Florida immediately at the end of the war, admitting she had been out of the Union previously. Suit was instituted upon the note about that period. If considered as a State that had never been out of the Union, of course it was applicable. 3 Story on Const., sec. 1830.

The principle seems universal, that a mere change of government, whether by revolution, conquest, cession, or by the State itself, does not affect the rights of persons or property. England, France, and I believe all the nations of Europe, have regarded such rights as inviolable.

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The convention has usurped judicial functions and powers which it had no power to do. 5 Hump., 565. It has declared what shall be defences upon a pre-existing contract, thus impairing its obligation. 11 Wis., 353. Its ordinances are retroactive; all laws should be prospective. If the former, and they impair contracts, they are void. 7 Johns. R., 477; 36 Barb., 447.

It is urged that the contract is annulled by a change of the constitution. But this cannot affect a valid contract previously existing. 18 How., 331, 380, 384; 7 Smith, 9; 1 Black., 436.

The convention, in declaring that the note in suit is not collectable, has exercised a political power belonging only to the government of the United States. Such an act is a quasi confiscation. Barclay vs. Russell, 424, cited by Woodbury, J., in Luther vs. Bowdon, 7 How., (U. S.,) 56. It has also invaded the principles of the *social compact*. 3 Dallas, 386; 2 Fla., 102.

An appellate tribunal of the last resort, when satisfied that a law, whether passed by a Legislature or a Convention, impairs the obligation of a contract, and is thereby in conflict with the constitution of the United States, will so declare. 4 Harrington, 389; 3 Story on Const., secs. 1570, 1393, 1426; 1 Kent, 293, 294.

A. H. Bush on same side.

In this case, I contend that the orders by the Circuit Judge at the fall terms 1869 and 1870, of the Circuit Court of Calhoun county, were unadvisedly made; that they were unauthorized by the law of the land, or the practice of the courts, and consequently were illegal and void; that the 26th section of the XVIth article of the constitution of this State, by which only it is sought to uphold them, was and is unconstitutional, considered with reference to the constitution of the United States, because it impairs the obligations

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of contracts. I refer to the following cases: 42 Ala., 602, 603, 612, 614; 43 Ala., 224, 230 to 233; *ib.*, 173, 174.

In the case of Lapsley vs. Weaver, it was ruled by Peck, C. J., "that the Circuit Court, neither in vacation nor in term time, had any power to grant a new trial on the application of the defendant in a cause which has been affirmed in this court on his appeal. If said new trial is unadvisedly granted by said court, it is its duty, on the motion of the plaintiff in said case, to set aside and vacate said order granting a new trial, and to strike said cause from the docket." This is precisely our case. Also refer to the following head notes of decisions of the Supreme Court of Alabama: In the matter of the petition of Richard H. Sims, Fitzpatrick, executor, vs. Hearne, from Lowndes county, which is an important case. Ward's administrator vs. Hudspeth, from Henry Circuit Court.

In Lapsley vs. Brashear & Barr. 4 Littell, (Ky.,) 54, the Court of Appeals of Kentucky say: "The obligation of a contract operates through the medium of the sanction of the law, and consists emphatically *in those remedies which the law supplies, and may be denominated the legal obligations of a contract.*" *Ibid.*, page 55, paragraph 2 and last, as follows: "To be in conflict with the constitution, it is not necessary that the act of the Legislature should import an actual destruction of the obligation of the contract. It is sufficient that the act imports an impairment of the obligation. If it be in any degree *impaired*, or, what is the same thing, if the obligation be *weakened* or *rendered less operative*, or is made worse, the constitution is violated and the act so far inoperative. *Ibid.*, 57, 58, 59. See this case to its close. Van Hoffman vs. City of Quincy, 4 Wallace, 535, 548. At 551 the court says: It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and become a part of it as if they were expressly referred to or incorporated in its terms. This principle applies alike to those which af-

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fect its validity, construction, discharge and enforcement. The case of Van Hoffman reviews fully all the cases in the United States courts on this important subject. I respectfully ask for it a careful consideration, and refer particularly to the cases of Green vs. Biddle, Bronson vs. Kinzie, Sturges vs. Crowninshield, at pages 552 to 554, and note †; 4 Littell, 58-9; 1 Kent, 445, 456, n. 4; Sedgwick, 652 to 657.

The provisions of the 26th section of the XVIth article of the constitution of 1868 is unconstitutional, because its effect was to deprive the plaintiff of his property without due process of law, and, in fact, against the law of the land.

"The fundamental guards and guarantees" intended to secure vested rights are to be found *first* in the great constitutional restrictions, whether of the Federal or State charters.

1. Private property is not to be taken without compensation. 2. No law is to be passed impairing the obligation of contracts. 3. Property is not to be taken without due process of law, and every individual right is placed under the protection of the law of the land. These three constitutional checks, then, guard private property from the invasions of the State, protect contracts from violation under guise of law, and finally insure to every person impleaded, attacked or charged, the *invaluable right of systematic procedure, notice, evidence and judicial trial*. Sedgwick on Const. Law., 674-5.

The great idea of the protection intended to be conferred by our division of powers into executive, legislative and judicial, is perhaps best expressed by the proposition just stated, that the work of the Legislature is to be confined to the passage of laws as distinguished from judicial and executive acts, and this brings us to the precise question of vested rights, and all may be summed up in the idea that the Legislature can only make laws or legislative enactments as contra-distinguished from judicial sentences and decrees

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Sedgwick, 676, 688, note; *ib.*, 686, note; 10 Fla., 238, and the Alabama case at Mobile city, citing as follows: "A right carried into judgment, though for a penalty, cannot be disturbed or defeated, notwithstanding the statute authorizing it may have been repealed." 1 Hill, 234; 1 Black R., 451; 4 Moore & Payne, 341, 351. "A valid State contract or vested right cannot be abrogated by the adoption of a new State constitution, any more than the enactment of a law by the Legislature." 1 Black, (U. S.), 436; 18 How., 331, 380, 383.

An act of the Legislature, (for I cannot call it a law,) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. Sedgwick, 154, *et seq.*; 3 Dallas, 386; 5 Paige, 137; 4 Barb., 64, 74; 10 *ib.*, 223; 2 Selden, 358; 15 Barb., 529; 4 Conn., 209; 2 Peters, 627, 657; 2 Fla., 102.

As to the powers of the courts to declare the constitution of a State void, as being repugnant to the constitution of the United States: 1 Kent, 419, 451 to 456, and note as to remedies; Sedgwick on Const. Law, 663; 1 Cranch, 137; 18 How., 331.

E. J. Simkins for Appellee.

Appellant bases his first ground of error principally "upon the want of notice." 2d. Upon the constitutionality of the ordinance under which the court acted, which rendered the judgment below, to-wit: 26 Sec. of Art. XVI of Constitution of Florida.

The appellee claims that the court acted in conformity—1st, to the law. The petition filed in the circuit court at the fall term of Calhoun circuit court of 1869 was in the nature of a suggestion to the said court, that it was lending its process to enforce a judgment which had been set aside by the constitution itself.

The notice demanded by appellant was not necessary. The constitution was notice that there was no judgment.

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Appellee did give the only notice required. The judgment being set aside by the constitution, the suit was left pending, and was reinstated upon the docket to enable appellee to file the plea allowed under the constitution. Appellee having filed the plea, gave notice to appellant, who *appeared* and demurred. His appearance was a waiver of a want of notice. Scarlett, trustee, vs. Hicks, admr., and Lang, admx., 13 Fla. He could then have pleaded or had a trial by jury.

The other ground of objection to the order or judgment of the court at the fall term of 1869, was the constitutionality of the constitution in setting aside a judgment obtained in a court of competent jurisdiction upon a legal cause of action, and in that way impairs the obligation of a contract. Is this true? The judgment here set aside by the constitution was rendered at the fall term of 1866.

This court will take judicial notice of the fact, that at this time was existing the government, organized under the auspices of President Johnson, declared by the political department of the United States government to be invalid. See act of Congress, March 2, 1867. Courts are bound to follow the decision of the political department, and this question lay properly within the jurisdiction of Congress. 7 Howard, 1; 3 Wheat., 634; 2 Peters' Cond. R., 98; 4 Wheat., 64. The government being illegal, must necessarily have been unconstitutional, and courts being part, must represent and partake of the character of the government. Courts administer laws which must be valid and passed by the supreme power of the State. The State being under military control and subject to the *paramount power* of Congress, (see acts of Congress 2d March, 1867, July 19, 1867,) the government, so far as preserved, was only the agent of the Congress of the United States to preserve peace. To be courts of any jurisdiction, they must be constitutional courts. 21 Howard, 515; 24 Wendell, 520. There can be no *de facto* courts. 1 J. J. Marshall.

Whether, in 1866, the State of Florida did exercise sove-

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reignty and establish a civil government, has already been decided by the political branch of the government, the only power which has a right to do so, and all courts must respect and follow that decision.

It was the illegality of the government, and its acts as such, that gave rise to the absolute necessity for a constitutional convention, which not only had to erect a Constitutional Republican Government, but had to go further and examine and revise the acts and proceedings of the illegal tribunals of the past ten years. 5 Texas, 34; 21 N. Y., 9; see J. Denio's opinion as to powers of a constitutional convention. It was a revisory body, and as such it approved some laws, rejected others; it abolished the old courts and their officers, established courts of new and different jurisdictions; it approved certain judgments and decrees and transferred them to the custody and control of the various courts, while others it not only refused to ratify, but declared them set aside, and slave judgments since the year 1861 were thus unrati- fied and set aside. The courts that have passed these judgments are now defunct. The courts to-day are not only very different but of different origin, and for them to take cogni- zance of this judgment and enforce it would be an act of legislation. It would be hard for appellant to show that a *failure* to approve his judgment was impairing the obliga- tion of a contract. It can only be remedied by legislation. 38 Ga. But setting aside a judgment is not *necessarily* im- pairing the obligation of a contract.

In 2 Peters, 380, it was decided that no part of the con- stitution of the United States applies to a State law which divested rights which were vested by law in an individual. See also 8 Peters, 88; 11 ib., 420; 10 Howard, 395; 17 ib., 456.

Hence we conclude, that this court has no jurisdiction in this case, because appellant has no judgment to enforce and this court cannot enforce it, because the constitution does not ratify or transfer said judgment to this or any other

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court, but sets it aside; and this court must look to the constitution of the State and not to the constitution of the United States for jurisdiction.

But suppose the judgment in this case was rendered after the constitution of 1868 was adopted, the circuit court having overruled the constitution and taken jurisdiction in the case, and thus raise the entire constitutionality of the 26th Section of Article XVI of the State constitution?

Appellee contends that the ordinance in question does not conflict with the constitution of the U. S. 1st. Because when the constitution of 1868 was adopted, Florida was in no constitutional sense a State in the Union. What is a State in the "United States?" However sovereign a State may be before admission to the Union, when it entered into the Union it gave up its absolute sovereignty and became in a constitutional sense but a portion of a large empire, and its people a part of the people of the National Government, with limited and local powers. 6 Cranch, (Curtis,) 337. A State is a member of the Union with certain rights and privileges. 5 Peters, 20. When Georgia is spoken of as a State, reference is had to its political character. *Ib.*, 55. But a State not only has the great political rights of representation in Congress, (see constitution U. S.) of power to arrange her local affairs, and say who shall be its citizens and be entitled to protection and favor, but its great aim is to prevent centralization on the part of the general government. 5 Howard, 629; see Justice Woodbury's opinion. Tried by these tests, the State had forfeited her sovereignty—she could claim nothing—she could assert no right, but bowed to military dictation. After the surrender there was no State organization, but the people were resolved into original elements. Florida was certainly *not a State then*, for there can be no State without a body politic, and no body politic where there is no government; and that there was *no government* was admitted and asserted by both the President and Congress, (see proclamation and act,) and this

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court cannot gainsay it. The government that was set up was overthrown by Congress under the reconstruction acts, and the State of Florida came in as a *new State*, under the constitution of 1868. See argument of Thad. Stephens, July 20, 1867; Coolie on Const. Law, 41. Congress has the right to require certain fundamental ideas of public policy. See Missouri Compromise. So she could require of the State of Florida the abolition of slavery and the adoption of the 13th, 14th and 15th amendments, as the price of her admission; and when the people of the State had adopted the requisition, and had legislated to accommodate the affairs of the people to the new rules of law, and Congress had approved and examined said work, and upon it had admitted the State, the question of its constitutionality for impairing the obligation of a contract cannot be called in question, for it is a well settled principle, that a law or constitution passed prior to the admission of a State into the Union, impairing the obligation of a contract, yet approved by Congress, will not be set aside. A statute impairing a contract in Virginia, before the constitution of the United States was adopted, was held constitutional. 5 Wheaton, 420.

In Scott et al. vs. Jones, Justice Woodbury, says: "To give the court jurisdiction, on the ground of impairing the obligation of a contract, there must be an act of solemnity and importance, such as an act passed by a *State*, a member of the Union. 5 Howard, affirmed in 14 Howard, 79. Now the State of Florida, being admitted as a new State on the 25th of June, 1868, is not amenable to the charge of impairing the obligation of a contract. But whether the State of Florida was, during and after the war, a State or not, one thing is certain, by losing their government in 1865 they became amenable to the power of Congress, who alone could decide what measures were appropriate. 7 How., 1. That the act of 1868 is the crowning act of those measures, and it therefore depends upon the authority of Congress, who have dictated parts thereof, and approved and accepted it by sol-

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emn act of June 25, 1868. The very validity of this government depends upon its being the act of Congress, because the constitution of 1868 was mainly adopted by those whom Congress had freed or enfranchised, and who thus voted themselves to vote.

Now it is undoubted that the "impairing clause" of the constitution of the United States only applies to a State, but does not prevent Congress from impairing a contract. 1 Peters C. C., 337; Sedgwick on Statutory and Constitutional Law. It is incident to the sovereignty of the United States, given up by each State, but not by the government.

But this ordinance of 1868, now called in question, can be easily defended on the plainest principles of justice and equity. If the State of Florida has the right to destroy and take away, *without compensation*, one kind of property from the people, it surely has the right to take away other kinds. If it has the power to destroy property in slaves, it certainly has the power to create courts and deny jurisdiction to those courts to collect certain classes of contracts. What distinction is there in common sense or equity between a slave and a note given for a slave? Why should the rights of the creditor be the only property insured against loss or injury? The government is equally bound to protect all kinds of property. This case, or class of cases, is a law unto itself. At one stroke the government sweeps away fully two-thirds of the property of the State, and that, too, the laboring classes upon whom depend the wealth and resources of the land, and yet the creditor comes in and claims to satisfy a debt for them contracted in times of prosperity, when the property was of great value, and the contract made by both upon the faith of the servitude of the slave being continued to work out the very debt. There is neither right nor equity in enforcing such a contract now—it was a case of mutual mistake; there is no *quid pro quo*. We are opposed by 12 Fla., 1, but strange to say, the decision was made on the presumed intention of the parties, and the presumption was made direct-

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ly contrary to the written contract. Again, it was based upon the knowledge which the presiding Judge had of the character of the appellant. 3d. Upon the right of eminent domain in personal property, which is an impossibility, because personal property has no *locality*, because it is an old maxim that *personalis sequitur personam*, and is not, by any possibility, liable to such a claim; and last, the constitution decides against and reverses the decision.

The freeing of the slaves was not intended as a forfeiture for treason—it was the legitimate result of the triumph of free government as opposed to slavery. The act was but the consummation of the higher law principles which had agitated the country for years. Because it was contended that slavery was wrong and immoral, when the slave was freed, was because it was wrong to keep them as such. They were taken from the South, not as property, but as a right to the human being kept in slavery; and Congress approved our constitution because it declared the slave notes void, which were a part and parcel of the same contract; and it was such a contract as tended to the perpetuation of the institution of slavery and to the continuance of the war waged for its defence, and, therefore, Congress declares that the said constitution, prohibiting the collection of said notes, was such a contract as they would accept, and was a legal republican constitution, and when it was so adopted, it became the law of the land.

This court can have no jurisdiction in this case, because it is forbidden by the constitution of the State, made by the people, who are sovereign. There are two kinds of conventions: 1st, to make amendments; 2d, to change the entire frame work of the government. 2 Hill, 222. And when their action is approved by the people, everything is bound to yield. 21 N. Y., 9. As to powers of constitutional convention, (see same case;) when the constitution is formed courts must follow the law as laid down. Cooley on Const. Lim., 44, 45. The courts are to declare the law as

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they find it. *Ib.*, 55. It is quite possible, the people, under prejudice, may make mistaken provisions, (3 N. Y., 568, C. J. Bronson's opinion,) but it is the duty of the courts to obey. The people had the right to fix the boundaries, and the remedy must be then in their hands. 24 Ga., 166-7-8; 39 Ga., 442-3. The appellee's remedies lie in the hands of the people, and this court would be legislating to assume jurisdiction.

Courts are sworn to obey the constitution. In Louisiana and Georgia, where there are the same provisions in their constitutions, we cite: 21 La., 527, 567, 757; 39 Ga., 285, 443.

WESTCOTT, J., delivered the opinion of the court.

If the Circuit Court could not make the order opening this judgment by virtue of the constitutional provision, it becomes immaterial whether these proceedings were taken with or without notice to the plaintiff in execution, or were attended with irregularities in other respects, as in either event they must be set aside. This is, therefore, the question which disposes of the case, and meets it fully upon its merits. Analyzing this clause in the constitution, we find that it refers to four subjects matter:

First. All deeds or bills of sale given for slaves, with covenant or warranty of title or soundness, or both.

Second. All bills, bonds, notes, or other evidences of debt, given for or in consideration of slaves which are now outstanding and unpaid.

Third. All judgments and decrees rendered in any of the courts of this State since the 10th day of January, A. D. 1861, upon all deeds or bills of sale, or upon any bond, bill, note, or other evidence of debt, based upon the sale or purchase of slaves.

Fourth. When money was due previous to the 10th day of January, 1861, and slaves were given in consideration for such money.

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As to the first two subjects, the constitution first prescribes a "*duty of the courts*," which is to "*consider*" that there is a failure of consideration; second, it provides, in the most positive language, that the *courts shall so hold*; and, in the third place, it declares that no action shall be maintained upon the contracts or evidences of indebtedness before mentioned. None of this language admits of a doubt as to its meaning, except the last clause.

It has been maintained upon one side that this last clause is a denial of jurisdiction to the courts, while upon the other it is insisted that this clause refers only to the right of the parties to the action; that the previous portion of the clause makes it *the duty of the courts to consider a subject which can only be raised by a plea to the merits, viz: the consideration of the contract, and directs the court as to its judgment*; that this clause, therefore, makes it the duty of the courts to exercise jurisdiction and pronounce judgment; and that, for these reasons, it is essential, if we are to give a consistent construction to the whole clause, that the latter portion should be held to be a denial of the *right of the parties* to maintain an action, and not of *jurisdiction in the court* to hear and determine the suit, for this is necessary to discharge a previously prescribed duty to "*consider*" and "*hold*." Again, it is said that even if it applies to the court, it is in effect a direction not to maintain the action in favor of the plaintiff, but to pronounce judgment for the defendant; that it is a direction as to the manner in which the courts shall exercise a jurisdiction previously granted in express terms, rather than a denial of it. A decision of this question involves the consideration not alone of this clause, but of all the clauses of the constitution having reference to like subjects matter, viz: indebtedness accruing from the sale of this species of property and the jurisdiction of the courts.

If the jurisdiction was denied to the Circuit Court, it certainly should not have exercised it, and we certainly cannot direct it to exercise it. Speaking of the matter of

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jurisdiction, Chief Justice Marshall remarks: "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." If the case was not within the jurisdiction of the Circuit Court, then the fact that the party seeks to enforce the obligation of a contract could not give jurisdiction. If the jurisdiction of the Circuit Court, under the constitution, does not extend to a particular class of contracts, then that court cannot take cognizance of them. Because all remedy upon the contract is destroyed, by organizing no tribunal to enforce it cannot give jurisdiction. The effect of this action is not to change the law applicable to the contract, but to destroy the power of the party to enforce that law by creating no court which can consider it. The jurisdiction of the courts is no part of the obligation of a contract. It is the means through which it is enforced. Courts possess implied and resulting powers from general grants of jurisdiction. Thus, a court invested with criminal jurisdiction, has a resulting and implied power to summon a grand jury, (1 Brock., 159,) but they have no inherent jurisdiction, (7 Cranch, 32.) We do not, however, think that this question arises in the case of judgments. The constitution, in the case of judgments, sets them aside. It then directs, in positive language, what shall be "held" a good defence to the suit in which the judgment is set aside. The effect of the whole clause would be simply to enable the court to open the judgment and permit the filing of a plea. The necessary result is, that instead of denying jurisdiction, it simply directs the manner of its exercise. Even if the terms, "no action shall be maintained," would be held to be a denial of jurisdiction as to contracts mentioned in the first clause, we would be obliged to make an exception of cases in which judgments had been rendered, as in these cases a certain plea is made a good plea, and it is directed that it shall be held a good defence by the court in this suit, and it cannot be so held by the court in any other

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manner than by the court giving judgment for the defendant upon the merits. This disposes of the question of the jurisdiction of the Circuit Court in this case.

It is not denied that the consideration for the note upon which the judgment is based was the price of a slave. Was the judgment, however, a judgment rendered in the *courts of this State*, since the 10th day of January, A. D. 1861, within the meaning of this clause of the constitution? This question is material, for if it is not such judgment, then the blow aimed by the constitution does not reach it. The language used presumes the existence of the State of Florida since January, 1861, as well as the existence of courts of such State during that period. A very casual examination of sections 1, 2, 3, 4 and 7 of article XV, and section 27 of article XVI of the constitution, shows that this judgment is a judgment rendered in the courts of this State within the meaning of the constitution. These causes expressly recognize the existence of conventions of the people of the State of Florida, as well as the existence of legislative, executive and judicial departments of the government of the State of Florida. They recognize that there were "acts and resolutions of the Legislature, acts and resolutions of the General Assembly, official acts of civil officers of the State and actions at law in the courts of the State, since January, 1861." And what is more important in this case, the convention expressly declares that "all judgments and decrees rendered in civil causes in any of *the courts of the State* since the year 1861, are of full force, validity and effect." The declaration, it will be seen, is not that these judgments *shall be* valid, but they are declared to be then valid.

From section 4 of article XV, it will be seen that the convention declares null and void all indebtedness by the State of Florida after the 10th day of January, 1861, and before the 25th of October, 1865; and that it mentions authorized liabilities of the State of Florida contracted prior to the 10th day of January, A. D. 1861, and subsequent to the 25th day

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of October, 1865, placing them both on the same footing. In view of all these provisions, we do not think the conclusion can be avoided, that this was a judgment of a court of the State of Florida within the meaning of these terms in this clause of the constitution, and we think it also apparent that, in the opinion of this convention, the court which rendered this judgment was a court competent to render valid judgments.

The judgment of the Circuit Court, rendered in this cause in 1866, is therefore one of the judgments which was declared set aside.

Whether this was a judgment of a court of the State of Florida is a question quite different from the one just answered, viz: whether it was such *within the meaning of the constitution*. The true nature of the subject matter upon which the convention acted must be determined before we can intelligently examine its powers in reference thereto. Was this a valid judgment, and if it was, what is a judgment of a court of competent jurisdiction? Having answered these two questions, we have only to determine whether there was power in the convention to do what is here done in the premises. This judgment was rendered by a court organized in conformity with the constitution of 1865, which constitution was formed at the instance of the President of the United States. We deem it entirely unnecessary, in determining this question, to enter upon any discussion of the various theories of restoration and reconstruction which have been the source of so much political controversy. If the theory of the President was correct, then the judgment is certainly valid; and if this theory was wrong, and that of Congress correct, then the judgment was equally valid. The Supreme Court of Alabama has gone as far as any judicial tribunal in denying power to the President in the premises, and in admitting the *paramount* power of Congress over this subject.

This precise question came before that court in the case

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of *Powell vs. Boon*, 43, Ala., 459, upon a motion to set aside a judgment rendered by the Supreme Court of Alabama under the government instituted by the President. The court held that although the government, organized under the authority of the President of the United States, was declared afterwards to be an illegal government by Congress, yet as the acts of Congress do not declare such government to be void, but permit it to be continued as a provisional government, said government thereby became a legal provisional government, and its acts and the acts of its officers are legal and obligatory upon the people of the State.

The Supreme Court of the United States, in the case of *Texas vs. White*, 7 Wallace, 731, while declining to enquire into the constitutionality of the legislation of Congress "so far as it relates to military authority or to the paramount authority of Congress," yet it decides that Congress regarded and treated this government as provisional, and remark that "the terms of the acts necessarily imply recognition of actually existing governments."

In either case, therefore, the judgment rendered was valid.

This judgment being a valid judgment, we next enquire, what is a judgment in contemplation of law? This judgment was final and absolute. It is not pretended in this case that there was anything connected with the proceedings in the Circuit Court which would have authorized the court to open it. "A final judgment is a contract. Contracts or obligations of record consist of judgments, recognizances, and statutes staple." 1 *Parsons on Con.*, 7. Contracts by judgment impose the highest obligation known to the law, and although there is in such contracts no promise in fact, the law implies a promise, and it is upon this principle that debt lies upon the judgment of a court of record. *Chitty on Con.*, 23. A final judgment is also property. It may be owned and the fruits of it enjoyed by the owner.

Thus disposing of these preliminary questions, we have only to determine whether the convention had power to do

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what this section proposes to accomplish. There is one acknowledged limitation upon the power of the delegates assembled in this convention, and that is such provisions of the constitution of the United States as apply expressly to the States. That constitution is the "supreme law, and the judges in every State are bound thereby, anything in the constitution or laws of the State to the contrary notwithstanding." It provides that no State shall pass any bill of attainder, any law impairing the obligation of contracts, or *ex post facto* law.

What was the character of this act of the convention? Was it legislative or judicial? This is material in considering the subject. Did it prescribe a rule to be followed, or did it itself follow a rule? This is one of the principal distinctions by which we determine whether an act is legislative or judicial. One prescribes a rule to control others, the other follows a rule made by itself or some superior authority. The first is legislative, the second is judicial. Another difference is that judicial acts follow notice, while legislative are without notice. In the very nature of things, so far as the courts are concerned, this clause, viewed as a whole, prescribed a rule of action for the disposition of a certain class of judgments then upon the records. The court which rendered the judgment had finally adjourned for the term years before. After this adjournment, the judgment was final and conclusive. The court had no power over it. There are some exceptions to this rule, but there is nothing in this case which brought it within these exceptions according to the then and now general rule upon the subject. What was this new rule now prescribed? It was, that notwithstanding a final judgment was upon the record; that notwithstanding no plea was filed in the case suggesting the fact that the consideration of the contract was the price of a slave sold, yet upon a suggestion of such fact, and of its proof in case of an issue, the court should open the judgment; that it should then permit a plea to be filed setting up such fact,

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and that the court should hold such plea a good defence. As a matter *of fact*, the convention could not and did not itself open the judgment. It had no record before it in the exercise either of original or appellate jurisdiction, and notwithstanding its declaration that it was set aside, it was not in point of fact opened until the order of the Circuit Court to that effect. When the motion was made, the court looked to the constitution for the law of the motion for the rule to guide its action. The record of the judgment was in the Circuit Court, the execution was in the hands of the sheriff. The convention did not act upon this particular case. It acted upon a class of judgments, upon the rights of a number of individuals, without respect to any privity of contract between them. Its action could not be judicial. No case was made, no suit instituted, no parties were contesting before it, no service of process, no notice. In the very nature of things, no case could ever be made in which different judgments and decrees in distinct cases, some in courts of law, some in courts of equity, could be opened by one general order. It could not be judicial action, for that proceeds upon the view that in the opinion of the convention the judgments were not valid, as matter of law, while the convention, as we have seen, expressly affirms and declares that they were valid. Viewed in this light, that is, as prescribing a rule, the clause must be valid as a whole, and is not divisible. Its effects is to destroy a judgment, valid according to the views of the convention, by the exercise of a power superior to the obligation of the contract, or, which is the same thing, the law of the contract when made. As a consequence, it not only impairs the obligation of the contract, but it abolishes, nullifies and destroys all obligation which attached to the contract. That rule which directs a court to open a valid judgment for the plaintiff, and make an illegal judgment for the defendant, certainly impairs the obligation of the contract upon which the judgment for the plaintiff was based, for it changes the law applicable to the

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contract in an essential respect, and that is, its obligation. To be more precise, the consideration, which is a part of all contracts, was in this contract the price of a slave sold. It was a transfer of something recognized as property by all law in force in the place of the contract at the time it was made. This was, in the eye of the law, something of value moving from the payee to the maker of this note, and that is its consideration. This note was then a promise made for a legal consideration, not a promise without a consideration, or *nudum pactum*. The promise with a consideration has a legal obligation attached. The law will enforce it, while it will not the promise without the consideration. The result is, that when you take from the contract the consideration, you leave a promise, and nothing but a promise, and the consideration which is essential to the legal obligation is destroyed. If you destroy the consideration, you destroy the obligation. It makes no difference that an act of this character is by a State convention, as the prohibition of the constitution of the United States extends to that act of a State, whether through its Legislature or a convention of this character. Such is the decision of the Supreme Court of the United States, which may review our judgment in this respect, and which is necessarily binding upon us in all matters within its jurisdiction. When this rule, prescribed by the convention for the control of the Circuit Court in the matter of opening this judgment, is in conflict with the rule prescribed by the constitution of the United States, which is the supreme law, anything in the constitution of this State to the contrary notwithstanding, the court should have followed that rule which was the law, and not something which was not law. When the motion was made to open this judgment, the court, if it had taken a correct view of the law, must have seen that the only judgment it could render was for the plaintiff, and as that judgment was already of record, it should have refused to disturb it.

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We have thus considered this provision in the light of a retrospective law operating upon the contract and the rights of the parties. This, we think, is the correct view to take of it. It is not alleged in this record as a fact that the slave, which was the consideration for this note, was emancipated, and the emancipation of this particular slave cannot be presumed from the fact that all slaves were emancipated some five or six years after the sale. This, however, is immaterial, for if this fact is admitted, it is in law no failure of consideration. The sovereign thus disposing of the property of a vendee, does not affect the right of the vendor against the vendee. The abolition of slavery, or the emancipation of the slave, does not destroy the right of action which the vendor of the slave so emancipated has against the vendee who owned the slave at the time of his emancipation, and any action of a convention of this character which directs the courts to hold otherwise is void, as it impairs the obligation of the contract. There is another aspect in which it may be considered. It may be insisted that it was the purpose of the convention to inflict a punishment upon the payee of this note for the moral wrong of acknowledging and actually dealing with this property as a consideration for a contract. In other words, of making it the subject of a sale, or that it was a punishment for acts of hostility to the United States, this class of judgments as a general rule being owned by those persons who had been guilty of treason in the opinion of the convention. In either aspect, it would be a bill of attainder, a bill of pains and penalties, "a legislative act which inflicts punishment without a judicial trial." 4 Wall, 323. It would be a legislative enactment depriving a man of his property as punishment, without any of the ordinary forms and guards provided for the security of the citizen in the administration of justice by the ordinary tribunals. 4 Wall, 325. It would be a conviction and sentence pronounced by the convention, the punishment inflicted being determined or fixed by no

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previous rule, and without opportunity for hearing or defence. If this was really the purpose of the provision and its result, it is entirely immaterial that the language used does not expressly disclose the purpose, for the laws deal with the result. In the language of the Supreme Court of the United States, when speaking of a bill of attainder, "the constitution of the United States deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding." 4 Wall, 325-7. There is another aspect in which this clause may be considered. This is, that the power exercised was in part judicial, and in part legislative; that in part it declares the law applicable to a given state of facts, and in part prescribed a rule for the Circuit Court. In other words, that the convention, in setting aside the judgment, exercised a judicial power, the result of which was, that in contemplation of law, the judgment rendered in the Circuit Court was set aside and effectually destroyed, and that no court has authority to review or disregard the judgment of this high and supreme tribunal.

We have already given the reasons for our conclusion that the whole clause was the exercise of legislative power, and necessarily void; but if this construction is admitted to be correct, it does not alter the result. This construction involves a division of the clause. As to the rule prescribed in the latter portion, we have already seen that it conflicts with the constitution of the United States, and that the Circuit Court, if it acted at all, could not follow it. The subject acted upon here was a judgment, which is as much the property of the plaintiff as his horse or his house. In this aspect of the case, we have a judgment destroying it. The judgment is made without either notice, hearing or trial. In

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other words, property is lost without due process of law, and the right of possessing this particular property is absolutely destroyed and denied. According to all theories of government in this country, while property may be subject to many burdens, and the owner's right of controlling and using it may be properly subject to regulations necessary, as matters of internal police and for public benefit, yet such an exercise of power as this is pure despotism. It pertains to no known attribute of government in a republican system. This convention was not an assembly of delegates representing a people in a state of nature, with no higher title to their possessions than occupancy, or with no better protection than their strong muscle and individual physical power. They represented persons whose right to property was then a right ascertained and fixed by law, whose rights of property were secured by law, made by authority equal to that which this convention possessed. These rights were secured by rules prescribed by delegates possessing like authority to these delegates, for, in the very nature of things, some organic law was operative at the time, and whether it was the constitution of 1861, 1865, or 1839, is immaterial, as they each contain provisions adequately protecting rights of property. Even if Florida was a territory, these rights were as fully protected by the constitution of the United States. These delegates did not exercise original powers, but a delegated authority. If they were selected for a defined purpose by the people, and when assembled they do acts clearly not within the scope of their agency, and exercise powers which were then in another body of magistracy by a previous grant from the same power which called them into being, and the time for which this previous grant had been made had not expired, then the exercise of such powers must be beyond their authority. What was the act here performed? It was an exercise of the *judicial power* of government. Was this convention called for any such purpose? If it was, or if it had the power to try one case, or

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to exercise judicial functions in one instance, where is the limit? Could they not have organized themselves into a permanent judicial tribunal to hear and determine cases? If they could exercise such judicial powers, could they not also have exercised executive and legislative powers, and thus constitute themselves the repositories of all the powers of government for the purpose of their exercise? Could they not have given one month to the trial of causes, another to the making of laws, and another to the appointment of officers to execute those laws? To exercise the functions of government, at the same time prescribing their own rules to control their judgment, is a power which cannot appertain to a body of thirty-three or four individuals in this country, and such acts, if attempted, are revolutionary and unauthorized. This would be the government of an oligarchy or aristocracy.

This convention was called to frame a government republican in form, to delegate or distribute the powers of government to legislative, executive and judicial departments, according to a recognized republican system. For all the purposes of *exercising the powers of government*, there was a body of magistracy, at the very time that this exercise of judicial power took place, to which the trust of *exercising the judicial powers of government* was confided by the people of the State, by the Congress of the United States, and by the President of the United States. Even this convention itself recognized, as we have before shown, the validity of its acts.

Suppose the defendant in this cause had filed a plea in the Circuit Court, setting up that the consideration of this note was a slave; that the Circuit Court, as it must have done, had sustained a demurrer to this plea, and that to its final judgment upon the demurrer a writ of error issued from the then Supreme Court of Florida to the Circuit Court—suppose this cause had been heard in the Supreme Court on the very day that this clause was adopted by the

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delegates to this convention, and the judgment of the Circuit Court had been affirmed, the judgment is set aside by one tribunal, and it is affirmed by the other. Upon the prosecution of a writ of error to the Supreme Court of the United States, you would carry a certified copy of the constitution as the record of your judgment in one case, and a judgment roll of the Supreme Court of Florida properly certified in the other. Can it be doubted which judgment would be regarded as the judgment of the highest State court by the Supreme Court of the United States? We have here two inconsistent judgments, covering the same subject matter, between the same parties, in the same jurisdiction, each court claiming to be the highest court in the State. This is a possible case. In such a condition of things, what is the only rule of law or logic to solve it? It is the one we have stated. *Exercising* the judicial power of government was, under the existing constitution, the laws of the State, and the acts of Congress, a trust and power committed to the then existing judicial tribunals.

As a matter of power, force, and revolution, this convention might have tried and condemned an individual without notice, in the same manner as the property of appellant was disposed of. It would have been well for them, however, to have had sufficient power to sustain themselves against a minority opposed to them and in favor of the law, for they might themselves, perhaps, have been legally tried and hung. As a matter of law and government under constitutional forms, these things could have been done only by tribunals then existing, to which this power and authority was confided by law, and whose powers these delegates could not exercise without usurpation. In the case of *Rose vs. Hemely*, 4 Cranch, 241, Chief Justice Marshall said: "A sentence, professing on its face to be the sentence of a judicial tribunal, if rendered by a body not empowered by its government to take cognizance of the subject it decided, could have no legal effect whatever. The power of the court is,

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then, of necessity examinable to a certain extent by that tribunal which is compelled to decide whether its sentence has changed the right of property. The power under which it acts must be looked into, and its authority to decide questions which it professes to decide, must be considered." The rule is the same when applied to judicial acts of this convention.

In the view which we take of the matter, the rights of the people are not limited by any superior power, nor does our solution lead us to the conclusion that there is a power superior to the people. The conclusion reached is, that this convention had no inherent powers of sovereignty, but that the delegates were limited by the extent of the power delegated to them by the people.

True it is, that when the new government was organized, the authority to exercise the powers of government passed into a new body of magistracy. This was because the time for which the first grant was made had expired. It may be urged in this case, that this constitution has been submitted to the people, and has received their sanction, as well as the sanction of Congress, and that admitting that this act of the delegates to this convention was void, being in excess of their authority, yet having been approved by the people, and the State having been admitted by Congress, it became valid and effective. As to Congress, its action extended no farther than to affirm, by admitting the representatives of the State to its councils, that the government of the State, which was to operate in future, was republican in form. As to the effect of a majority vote of the people, the act of the delegates being void for want of authority, the question arises whether this was not an act which the people themselves could not, under existing law, perform, except through a delegate. Now there was a recognized legal method of making changes in organic law. That method was not by a simple majority vote of the people; and we cannot perceive how a ratification of a void act by such majority vote would give

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it validity, especially when this act operates as a denial of the authority over the same subject matter in another body of magistracy who possessed all legitimate authority in the premises. This view makes it within the power of the delegates, where the vote is taken upon the entire constitution, to force the people to take a part of a whole which they do not desire, or else reject the whole. A majority of the people by so voting cannot set aside a judgment of the Circuit Court, or give additional validity to an act of the Legislature, or make an unconstitutional act effective. Why then should the addition of an unauthorized act of their delegates to this majority vote accomplished that result? If thirty-two or three men possess all power, legislative, executive and judicial, and are governed by nothing except their fancies or prejudices in the exercise of these powers, this cannot be a republican form of government. To admit that this power exercised arbitrarily by a convention can be made valid by a majority vote of the people of a State, is to admit a power in them to deny to a citizen of the United States his right under the constitution of the United States, and existing organic law of the State, to have his rights to property in time of peace adjudicated in judicial tribunals of the government of the United States or the government of a State, where the powers of government are distributed to legislative, executive, and judicial departments, according to a recognized republican system, and where the exercise of these powers is regulated by law. The power of the people of a State who propose to act with reference to their obligations under the constitution of the United States, does not extend to abolishing the republican form of government, and the institution of an aristocracy or oligarchy. It is true that no claim is made to any title of nobility by these delegates, but that is immaterial. We must look to the act. (Cooley's Con. Lim. 17, 18, 33; 4 Wall, 277; 1 Black., 436.) So far as the rights of appellant are concerned, if they are destroyed, they are destroyed by the arbitrary exercise of power by a

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few men, whose power is not regulated by law. If the people themselves attempt to abolish the republican form, it is revolution; and the legality of such an act as this involves the power to abolish that form, for it is entirely inconsistent with it. What the effect would be if this select body sustained themselves by force, and became in fact a government, it is not material to consider, for that is not this case.

But even if it is admitted that these delegates had the right to exercise judicial powers, it is important to enquire whether they were not controlled in its exercise by rules which then existed, or which they themselves prescribed for the exercise of all judicial power, and which the people ratified by their votes. If this was the exercise of judicial power, then it was a judgment depriving the citizen of his property, without either notice, an opportunity for hearing, and without a trial. The bill of rights, declared but not established by these delegates, declares that the right of possessing property is an inalienable right. The right of the appellant to possess this particular property is here destroyed, although declared inalienable. The bill of rights also declares that no person shall be deprived of property without due process of law. This is a right declared to be beyond and above their power. In this case, the property of the plaintiff in the judgment was destroyed, if at all, without either notice, an opportunity to be heard, and without trial. This was without due process of law. If this provision in the bill of rights amounts to anything, it is a fundamental rule of law applicable to any and all authority in the State that proposes to exercise the powers of government. It was a limitation upon all judicial power which the convention acknowledged existed then. It was an acknowledged limitation upon their own powers. When such a judgment as this was presented to the Circuit Court, it should have examined into it to ascertain its character in this respect, and if it was rendered without notice, hearing, or trial, and without any appearance, it should have disregarded it as be-

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ing contrary to a rule which in this country governs and controls every tribunal exercising judicial powers, no matter what may be its character. Every court has authority to examine collaterally the judgment of another court to this extent; and even when it is offered only as evidence, if such defects exist, it must disregard it. (3 How. 763.)

Such an act at this time would be in conflict with the fourteenth amendment to the constitution of the United States, which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, *nor shall any State deprive any person of life, liberty, or property, without due process of law*, nor to deny any person within its jurisdiction the equal protection of the laws.

We have thus considered this clause in the constitution in two different respects, as the exercise of either legislative or judicial power. It cannot be claimed to be executive. We have treated it—

First. In its true character. That is, as a law operating retrospectively upon the contract and the rights of the parties. In this aspect it impairs the obligation of the contract and is void.

Second. We have considered it as if intended as punishment. Then it becomes a conviction and sentence passed by the convention, the punishment inflicted being determined by no previous rule, and without opportunity for hearing or defence. In this aspect it is a bill of pains and penalties, and is void.

Third. If it is the exercise of judicial power, simply setting aside the judgment, then it is the exercise of a power by the delegate which had not been conferred, and the delegate possessed no inherent power of this character. Such an act could not become valid by receiving the sanction of a majority vote of the people, because a citizen of the United States in time of peace, under the constitution of the United States, has a right to have his right to property made the

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subject of investigation by no other tribunal than one which is a part of a government republican in form, such as a court of the United States or State governments; and the people by their votes cannot give validity to the void act of a body of delegates which deprives the citizen of his property without due process of law.

All of the proceedings of the Circuit Court affecting the judgment rendered in this case on the 25th day of October, A. D. 1866, and the process issued thereon, and from which this appeal is prosecuted, are set aside, and the case is remanded for such proceedings as are consistent with this opinion and the principles of law.

**COUNTY COMMISSIONERS OF COLUMBIA COUNTY VS.
CHARLES R. KING, TRUSTEE.**

1. Where a duty is imperatively required by law to be performed by ministerial officers, as the levying of a specific tax, no demand is necessary to lay the foundation of an application for a writ of *mandamus* to enforce it.
2. The 22d section of the act known as the Internal Improvement Act authorized Boards of County Commissioners to subscribe for stock in railroad companies, and to issue bonds, bearing interest, for the purpose of paying the subscription, and requires the commissioners to levy an annual tax to meet the interest as it becomes due. The county of Columbia, in 1855, subscribed for such stock, and issued its bonds. Simultaneously, the Supreme Court of the State, in a case before it involving the validity of the law, pronounced it constitutional, and the county continued the issuing of its bonds until the whole amount authorized was issued: *Held*, That upon application for a writ of *mandamus* against the commissioners to compel the levy of a tax to pay the interest, by a *bona fide* holder of coupons representing the interest due upon these bonds, they having been issued under the sanction of the highest judicial authority of the State, and the acquiescence of the people of the county, it is too late to question the constitutionality of the law

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and the validity of the bonds in the hands of a *bona fide* holder, and that a judgment of the court now, declaring the law unconstitutional, would not affect the bonds heretofore so issued, but would operate only upon the future.

3. The compounding of interest is not *unlawful* under the laws of this State, which limited the rate of interest.
4. Coupons representing the interest of county bonds were issued by the County Commissioners, signed "S. L. Niblack," without an official designation, but it appearing that they were in fact regularly issued: *Held*, that the county was liable upon them.
5. *Mandamus* is the proper, because the only efficient remedy to enforce the collection of taxes to satisfy the interest due on the bonds of a county, such bonds having been issued under a law requiring the levying of a tax for that purpose, and may be resorted to without first obtaining judgment, and the court has the power to ascertain the amount of the coupons, without the intervention of a jury.
6. Bonds were issued by Columbia county, and afterwards a portion of her territory was detached and formed into new counties, and provision was made in the act of separation that the new counties should compensate the county of Columbia according to the relative and *pro rata* assessed valuation of the property in the territory detached: *Held*, That it is not necessary or practicable to make the new counties parties in a proceeding against Columbia county to enforce collection of the bonds.
7. Severing a portion of the territory of a county by act of the Legislature, and the freeing of slaves by the sovereign power of the State, thus lessening the aggregate value of the taxable property in a county, do not constitute a taking of "private property for public use without just compensation."
8. Bonds issued for the purpose of paying a subscription for railroad stock are not a lien, under the 22d section of the Internal Improvement Act, upon the stock so purchased.
9. The laws in force at the time of making a contract, and in pursuance of which the contract is made, enter into and form a part of the contract, as if they were incorporated into it, including those which affect its validity, construction, discharge, and enforcement; and when a county issues its bonds under a statute which provides the time and manner of discharging them, as by levying an annual tax, the Legislature cannot, by repealing the act or changing it, limit the amount of taxes to be levied to a rate insufficient to raise the amount necessary to meet the obligation, unless other adequate means are provided. Such a law impairs the obligation of the contract.
10. The court is not authorized (in a proceeding by *mandamus* against a county to enforce the collection of a tax to meet the interest coupons of

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the bonds issued by the county,) to direct the collection of interest upon the coupons. The law under which the bonds were issued, requiring the County Commissioners to levy and collect a sum sufficient to meet the interest on the bonds, the court, by *mandamus*, will only direct them to do what the law required them to do.

11. A peremptory writ of *mandamus* is not amendable. Its mandate must correspond with that of the alternative writ, and if that be defective, or claim too much, it may be amended.

Appeal from the Circuit Court for Columbia county.

Charles R. King, trustee, presented to the Circuit Court of Columbia county, his petition for an alternative writ of *mandamus*, to be directed to Abel J. Hutchinson and others, composing the board of County Commissioners of Columbia county, and to their successors in office, commanding them to proceed to levy and collect a tax upon the property and persons within said county to pay certain instalments of interest alleged to be due to the petitioner upon the coupons in his hands, which coupons represent the interest due upon bonds issued by the county, or to show cause why they should not do so.

The petitioner alleges that the county of Columbia is indebted to him in the sum of eighteen hundred dollars, being the amount of certain coupons, copies of which are annexed, and the further sum of three hundred and twenty-one dollars of interest accrued upon said coupons, which he had demanded and the county refused to pay. That in 1853 the Legislature of Florida by law incorporated the Florida, Atlantic and Gulf Central Railroad Company, with capital stock to be divided into shares of one hundred dollars each. That in 1855 the Legislature passed a law entitled "An act to provide for and encourage a liberal system of internal improvements in this State," wherein, by section 22 of said act, the Boards of County Commissioners of certain counties through which the railroad might pass, of which Columbia county was one, were authorized to subscribe for and hold stock in said company, with the approval of the voters of said counties, upon the same terms as other stockholders,

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and to issue bonds of such county, payable, with interest, at such times and places as they may deem proper, and dispose of the same for the payment of such subscription, pledging the faith and resources of such county for the payment of such bonds and interest, and that they should from time to time levy and collect such a tax as shall be necessary to pay the instalments of interest and the bonds as they become due, or to create a sinking fund for the gradual reduction of the same, the rate of interest not to exceed ten per cent. per annum, and the receipt for the payment of such tax shall entitle the tax-payer to one share of stock for every hundred dollars of taxes paid, of the stock so subscribed for by the County Commissioners, which receipts are assignable, and no stock held by the county shall be assignable, except in exchange for the bonds, until the bonds shall be paid. That in September, 1855, the question whether the county of Columbia should subscribe for stock was submitted to a vote of the legal voters, and a majority of votes being in favor of such subscription, the commissioners subscribed for and took one thousand shares of the stock in said railroad company, and in payment of such subscription issued the bonds of the county to the amount of one hundred thousand dollars, bearing interest at eight per cent. per annum, payable semi-annually on the first days of January and July in each year, which bonds were respectively dated and issued between the first of January, 1856, and 1860. That the bonds had coupons annexed representing the half-yearly interest, payable to bearer, at the city of New York, signed by S. L. Niblack, who was the President of the Board of County Commissioners, each coupon being numbered to correspond with the number of the bond. That petitioner is the *bona fide* holder of coupons to the amount of \$1,800, long past due, payment whereof he demanded, according to their tenor and effect, and the same remain due and unpaid, and the County Commissioners have failed to levy and collect

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the tax as required by law, whereof he prays the writ of *mandamus*, &c.

The following is the form of the coupons :

"Florida, Atlantic and Gulf Central Railroad Stock.—
The county of Columbia, Florida, will pay the bearer, on
the 1st of January, 186—, at their agency in the city of
New York, ——— dollars, being six months' interest on
their bond, No. —. Signed, S. L. Niblack."

An alternative writ was issued, returnable on the 1st day
of August, 1869, directed to the members of the Board of
County Commissioners, commanding them to proceed, as a
Board of County Commissioners, to levy and collect the
amount so due the petitioner, to wit: \$1,800, the amount of
the coupons, and \$324 interest which has accrued thereon
since the coupons became due, or to show cause, &c.

The commissioners made return to the alternative writ,
insisting :

1. That they were entitled to notice of the filing of the
petition before the issuing of the writ, and
2. That the writ was issued in behalf of Charles R. King
individually, and not as trustee, as named in the petition.
3. They admit that the bonds and coupons were issued as
alleged.
4. They insist that the 22d section of the Internal Im-
provement Act, approved January 6, 1855, is unconstitu-
tional and void, and that consequently the bonds issued
were unauthorized and not binding upon the county.
5. That the issuing of the coupons was not authorized by
law, and that the issuing thereof is compounding the inter-
est, in violation of law.
6. That the indebtedness for interest is unliquidated in its
nature, and can only be ascertained by bringing suit upon
the bonds; that a *mandamus* can only be authorized after
judgment recovered; that, in proceedings by *mandamus*,
there is no power in the court to ascertain the amount due.

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7. That the coupons do not purport to bind the county, but only S. L. Niblack.

8. That the Legislature has annulled and abrogated the contract between the county and the bondholders, by disrobing Columbia county without her consent of one-half her territory, in creating new counties from the territory composing the county at the time of the issuing of the bonds, and by the action of the national government and of the people of the State in abolishing slavery, and they insist that the bonds and coupons cannot be collected until compensation be made by the State, and that the redress of the relator must be had from the State.

9. That the Commissioners of Columbia county possess no legal power to assess and collect taxes beyond the boundaries of the county as now constituted, the property in the new counties taken from her territory having been liable to contribute to the payment of the bonds, and the new counties of Suwannee, Baker and Bradford should have been made parties.

10. That the commissioners exceeded their power in issuing the coupons, and that the demand should have been made upon the bonds for the payment of the interest, and not upon the coupons.

11. That the 8th section of article XII of the constitution prohibits the levying of taxes upon persons for paying the interest on any bonds issued by counties for the benefit of any chartered company, and that thereby the County Commissioners have no right to levy or collect a tax to pay these bonds and interest.

12. That the State has abrogated the contract of the county in this, that the county could not assign the stock until the bonds were paid, or in exchange for the bonds, thereby giving a lien to the bondholders upon the stock for the payment of the bonds and interest, and the trustees of the internal improvement fund, without process of law, have sold the railroad and its franchises, thereby depriving the

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county, as a stockholder, of its property and means of relieving itself of this indebtedness.

These are substantially the propositions set forth in the return and answer of the respondents.

The court adjudged that the return was insufficient, and directed the issuing of a peremptory *mandamus*, whereupon the respondents appealed.

R. W. Broome and *S. L. Niblack* for Appellants.

We present the following law points as bearing on this cause and applicable:

A demand and a refusal to perform, is a pre-requisite to obtaining a writ of *mandamus*. *Whea. Selwyn*, 1093-4; *Tapping on Mandamus*, 71, 72, 73, 81, 368, 369.

The 22d section of the "Internal Improvement Act" grants to county organizations the power to issue bonds, which is clearly in violation of the fundamental law. Sec. 4, Art. VIII Const. '39; 6 Fla., 610, and dissenting opinion, and references therein; 3 *Peters' Dig.*, 556; *Thomp. Dig.*, *Restrictions on Power of General Assembly*, p. 46.

We hold and contend that claiming interest on interest is in violation of then existing laws on usury. *Thomp. Dig.*, 234-5.

We hold and contend that the books of a corporation are the best evidences of its acts, and when a fact is disputed, there must be some testimony to prove which is correct as to facts. 4 *Wheat*.

When an amount in excess of the face of a written obligation is claimed and disputed, it should be determined in a proper manner and in a proper action. We hardly think this will be denied.

A *mandamus* cannot lie in this case until after judgment at law and a refusal to pay the same. 4 *Barb. Rep.*, 64; 28 *Casey*, 108.

A common law judge cannot determine an amount due

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on a disputed claim save by consent, except through the intervention of a jury, as prescribed by law.

The Legislature cannot divest parties to a contract of their obligations, except by the consent of all interested; therefore, the new counties should be made parties respondents to the action. . 22d sec. "Internal Improvement Act;" Acts 1858, p. 37.

The pleading shows that without the consent of Columbia county, as now constituted, these new counties have attempted to divest themselves of their bounden obligations.

The State cannot take private property for public use without first rendering just compensation. 2 Peter's Dig., 555. 559; 2 Peters, 256; 18 Wend., 56.

In this case, it is giving aid to a monopoly in violation of constitutional law then in force. Art. 1, Sec. 4 Const., and authorities above.

Where, by law, a lien is created before an indebtedness is contracted, and the holder of the indebtedness takes it subject to that lien and accepts it, the lien must be first absorbed before he can go to other means to realize his indebtedness. Sec. 22 "Int. Imp't Act."

When a county is limited by law in its taxes, it cannot go beyond that limit. Thomp. Dig., 99; Act 1869.

The pleadings show that by section 8 of article XII of the constitution of 1868, the County Commissioners are forbidden to levy such a tax as is here sought to be collected; and, also, that negro slaves being the basis of the indebtedness, by article XVI, section 26, there is a failure of consideration.

The errors not mentioned are substantially embodied in the foregoing, save that counsel holds and contends that, in this particular instance, the 22d section of "Internal Improvement Act" is unconstitutional, and null and void. Thomp. Dig., Restrictions on Powers of the General Assembly, p. 46-7. And as additional authorities, they offer Bov. Law Dic., heading "County Corporate" and "Cor-

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poration;" Act of Assembly 1858, p. 37; Whea. Selwyn, 1093-4, note 2, and authorities; Tapping on Mandamus, 61, 62, 63, 68, 71, 72, 73, 81, 368-9; Bill of Rights, Const. 1839 and 1868; 1 Kent's Com., 252; Secs. 1, 2, 3 and 4 of Art. VIII Const. 1839 and 1868; Sec. 13 of Art. XIII Const. 1839; 3 Peter's Dig., 555, 559; 6 Fla., 610, and references in same.

J. J. Finley and Wm. Bryson for Appellee.

Wm. Bryson for Appellee.

Notice of filing a petition for alternative writ of *mandamus* is not necessary. Moses on Mandamus, 203; 2 Redfield on Railways, 258, sec. 2, 5.

The 22d section of the Internal Improvement Law of 1855 is constitutional. 6 Fla., 610; 10 Fla., 112, 238.

The doctrine of these decisions has been sanctioned by the highest courts of at least sixteen States, and by the Supreme Court of the United States. 21 How., 539, 545; 1 Black, 386; 1 Wallace, 83, 175, 202, 291, 384; 3 ib., 327; 5 ib., 194, 705, 772.

Suit upon the bonds is unnecessary in this class of cases. The amount to be paid is named in the coupons, and the intervention of a jury to assess damages is not required. Moses on Mandamus, 102 to 108; 6 Ohio, (State,) 280; 2 Metcalf, 56, and cases last above cited.

It is contended that the coupons do not purport to bind the county, but one S. L. Niblack. The coupons were attached to the bonds issued by authority of the county, and are referred to in the bonds as representing the interest thereof. The form is of no consequence.

It is said that since the issuing of the bonds, the State has reduced the territory of the county, creating new counties out of the former, and destroyed the slave property, thus reducing the means of paying, and in effect abrogating the contract. We reply, that the acts of the Legislature pro-

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vided for the reimbursement of Columbia county by the new counties made from her territory, and the contract cannot be abrogated without the consent of the other party thereto, viz: the holder of the bonds. Laws of 1853, p. 9, sec. 22; Laws 1859, p. 37, 59; Laws 1860, p. 59, 179; 4 Wallace, 535; 5 ib., 772; 6 Fla., 610; 6 Cranch, 87, 137, 144; 2 Story on Const., 270.

It is claimed that demand should have been made for the payment of interest, and not on the coupons. We answer by citing *Moses on Mandamus*, 102, to 108; 6 O. S.; 2 Metcalf; 21 Howard; 1 Black, and 1 Wallace, before cited.

The 8th section of article XII of the constitution of 1868, providing that no tax shall be levied on *persons* for the benefit of corporations or for the payment of interest on bonds issued by chartered corporations, cannot apply. The tax sought to be levied is upon property, not upon persons, and the bonds are not issued by chartered companies.

There is no law giving the bondholders a lien upon the stock of the railroad issued by the county. On the other hand, the county is authorized to sell the stock, by express legislation. Acts of 1855, 1860, 1866.

The law expressly required the County Commissioners to levy a tax for a specific purpose. They have neglected this duty, and *mandamus* is the appropriate remedy to compel officers to perform their duties.

HART, J., being interested in the question, did not sit in the case.

RANDALL, C. J., delivered the opinion of the Court.

The appellants assign the following errors, which are treated of in their order:

I. "That the court erred in deciding that no demand to pay the coupons was necessary to obtain the writ of *mandamus*."

We have in the record before us only the petition, the re-

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turn, and the judgment of the court. There is no bill of exceptions showing what took place at the trial, and we can only know what were the rulings of the court by necessary inference from what appears in the record. The petition alleges that a demand was made according to the tenor and effect of the coupons, and the county refused to pay. The return does not deny this, but proposes to excuse the board of commissioners by showing that they ought not to pay. But certainly, in a case of this character, where a duty is imperatively required by law, and the thing to be done must be as well known to the board as to the holders of the bonds and coupons, no demand can be necessary to lay a foundation for compelling the performance of the duty; a neglect or refusal to perform, showing an intention not to do the act required is sufficient. 3 Stephens, N. P., 2,292; Redfield on Railways, 441, note 5; the State of Ohio vs. Com's. of Clinton county, 6 O. S. Rep., 280. The provisions of section 22 of the Internal Improvement act are mandatory to the county commissioners to levy and collect a tax to meet the instalments of interest as they become due.

II. "That court erred in deciding the 22d section of the Internal Improvement act to be unconstitutional."

The appellants insist that the 22d section of "an act to provide for and encourage a liberal system of Internal Improvements in this State," is unconstitutional, and hence, that the bonds issued are void and created no indebtedness against the county, because, they claim, the act authorizing counties to subscribe for stock and become stockholders in a railroad company by issuing bonds and levying taxes to pay the same, is in conflict with section 4, article 8, of the constitution of this State, which provides that "The General Assembly shall have power to authorize the several counties and incorporated towns to impose taxes for county and corporation purposes respectively, and all property shall be taxed upon the principles established in regard to State taxation."

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We cannot regard this as an open question with reference to these bonds at the present time. The Supreme Court of this State in January term, 1856, in the case of Cotten, et al. vs. The Co. Com's. of Leon county, 6 Fla., 610, had before it and passed upon the precise question. That was a case of a bill filed to enjoin the commissioners of Leon county from levying and collecting a tax to pay an instalment of stock subscribed by the county in the Pensacola and Georgia Railroad company, under the authority of the same act. That case, judging from the high character of the circuit judge before whom it was commenced, of the judges of the Supreme Court, and of the respective counsel on either side, must have been thoroughly argued and considered in all its aspects. It is true, that one of the able judges dissented from the opinion of the court on that occasion, and he puts his reasons for dissenting from the majority of the court with much force and considerable emphasis. As an original proposition, in view of the want of unanimity in that decision, we might be expected to enter into a discussion of the questions involved, and if we should arrive at a conclusion differing with that of the majority of the court, we should yet be confronted by the almost unanimous concurrence of the courts of last resort in all the States of the Union, where the question has been adjudicated in the same direction, under constitutional provisions essentially like our own.

It is also proper to observe that the case of Cotten vs. the Commissioners of Leon county, was pending if not already decided by the Supreme Court, at the very moment that the earliest of the bonds of Columbia county were being issued, and they thus went forth upon the market and into the hands of third parties, not only sanctioned by the Legislature, but by the Judicial branch of the government, and thus they were treated and accepted by the world as having the very highest and strongest indorsement as to their validity, and the decision of the court in that case seems to have been acquiesced in by the people of the various counties, who were

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then about issuing their bonds under the same law and for the same purposes; and it does not appear that any steps were taken to enjoin the *issuing* of any of the bonds then about to be issued by the several counties, Columbia being one of them.

In the case of Gelpcke vs. city of Dubuque, 1 Wallace, (U. S.) 175, was involved a similar question. Article 8, section 2, of the constitution of Iowa reads thus: "Corporations shall not be created in this State by special laws, except for political or *municipal purposes*." * * * The Legislature created the corporation of the city of Dubuque for *municipal purposes*, and afterwards passed a law authorizing the city to aid in the construction of the Dubuque Western, and the Dubuque, St. Peters and St. Paul railroads by issuing to each \$250,000 of city bonds in pursuance of a previous vote of the citizens; and the city council was authorized and required to levy a special tax to meet the principal and interest. Mr. Justice Swayne delivered the opinion of the court, which was concurred in by all the Justices except one. The court say, "when a corporation has power under any circumstances to issue negotiable securities, the *bona fide* holder has a right to presume they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any informality in the hands of such a holder than any other commercial paper." It was insisted, under the provisions of the constitution of Iowa, that the general grant of power to the Legislature did not warrant it in conferring upon municipal corporations the power which was exercised by the city of Dubuque in this case; and that the 8th article forbids the conferring of such power upon municipal corporations by special laws. All these objections, the court say, have been fully considered and repeatedly overruled by the Supreme Court of Iowa. 4 Greene, 1; 4 ib., 328; 5 Iowa, 15; 6 ib., 265, 304, 393; 8 ib., 193; 10 ib., 157.) "The earliest of these cases was decided in 1853, and the latest in 1859, and

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the bonds were issued and put upon the market between the periods named. These adjudications cover the entire ground of this controversy. They exhaust the argument upon the subject; we could add nothing to what they contain. We shall be governed by them unless there be something which takes the case out of the established rule of this court upon that subject. It is urged that all these decisions have been overruled by the Supreme Court of Iowa in the latter case of the State of Iowa vs. the county of Wapello; 13 Iowa, 390. * * It cannot be expected that this court will follow every such oscillation, from whatever cause arising, that may possibly occur. *The earlier decisions, we think, are sustained by reason and authority.* They are in harmony with the adjudications of sixteen States of the Union. Many of the cases in the other States are marked by the profoundest legal ability. The late case in Iowa, and two other cases of a kindred character in another State, also overruling earlier adjudications, stand out, as far as we are advised, in unenviable notoriety. However we may regard the late case in Iowa as affecting the *future*, it can have no effect upon the *past*." As was said in the case of the The Ohio Life and Trust Co. vs. Debolt, 16 Howard, 432: "The sound and true rule is, that if the contract when made was valid by the laws of the State, as then expounded by all the departments of the government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent legislation or decision of its courts altering the construction of the law." "The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. * * It rests upon the plainest principles of justice. To hold otherwise, would be as unjust as to hold that rights acquired under a statute may be lost by its repeal."

This decision was affirmed in Meyer vs. City of Muscatine, 1 Wallace, 384, Thompson vs. Lee County, 3 ib., 327; and the court in Com'ns of Knox county vs. Aspinwall, 21 How.,

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545, where it was questioned whether bonds of the county, already issued, had been authorized by the necessary preliminary vote of the people, says, "We do not say that the decision of the Board would be conclusive in a direct proceeding to inquire into the facts previously to the execution of the power, and before the rights and interests of third parties had attached; but after the authority has been executed, the stock subscribed, and the bonds issued and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question, much less can it be called in question to the prejudice of a *bona fide* holder of the bonds in this collateral way." The suit was brought upon coupons.

Many similar cases have been decided by the Supreme Court of the United States, and the ruling has been uniform.

Whatever, therefore, might have been the opinions of the members of this court upon the question of the constitutionality of the law referred to, the fact that the bonds were issued and passed to the hands of third parties long years ago, that they were sanctioned by the judicial department of the government, and by the acquiescence of the people, it would be an outrage upon public justice, public credit, and the rights of the holders for value of these bonds now to step in and nullify the solemn adjudication of the highest court of this State, given when these bonds were about being issued, and upon the faith of which they were sold for the means used to promote an important public enterprise, and intended to develop and enhance the prosperity and value of property of the citizens of the State.

III. The appellants say, "The court erred in deciding that the interest alleged to be due on the coupons, which are simply the representatives of the interest due on the bonds, and which interest is here sought to be collected, was not, and is not in violation of the usury laws of the State at the time."

We cannot see that the interest represented by the cou-

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pons, adding thereto the lawful rate of interest upon the coupons when due, gives a greater rate of interest upon the bonds than was authorized by the law under which they were issued. The act provides that the rate of interest shall not exceed ten per cent. The bonds bear eight per cent. Interest upon the eight per cent. when due, added thereto, does not reach ten per cent. upon the bonds. There is, therefore, no "usury" in the allowance of this interest. Usury is defined to be the taking, or agreement for, a greater rate for the use or forbearance of money loaned, than is allowed by law. The act fixed the limit in the case of these bonds at ten per cent. per annum, and therefore the general law fixing the rate of interest did not affect the bonds. The interest upon the coupons, however, if allowed, should be at the rate established by the general law in force when the contract was made at the place where the contract was to be performed. But this subject of interest is treated in another aspect in a subsequent part of this opinion.

IV. "That the court erred in deciding that Columbia county was bound by these coupons, they being signed by S. L. Niblack, in his individual capacity, no testimony or evidence being before the court that they were signed for and in behalf of Columbia county, except the indefinite assertions of the petition, which are fully denied by the sworn return."

We understand, however, that not only does the petition allege, but that the return admits that the coupons, copies of which are annexed to the petition, were issued annexed to the bonds, and represented the interest to accrue upon the bonds. The body of the bonds refers to the annexed coupons as representing the interest which was payable, "on presentation of the coupons." The court in *Thompson vs. Lee county*, 3 Wallace, says, "Bonds with coupons payable to bearer are negotiable securities, and pass by delivery, and have all the qualities and incidents of commercial paper. It is not necessary that the holder of coupons, in order to recover

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on them, should own the bonds from which they are detached. The coupons are drawn so that they can be separated from the bonds, and like the bonds, are negotiable, and the owner of them can sue without the production of the bonds to which they were attached, or without being interested in them;" and in the Com'ns of Knox county vs. Wallace, 51 Howard, which was a suit upon coupons, and where the question was made that the suit could not be maintained upon the coupons without the production of the bonds to which they were attached, holds similar language, and this case is subsequently referred to by the Supreme Court as a leading case, settling that question. Mercer county vs. Hacket, 1 Wallace, 83, treats of the question of the negotiability of this kind of bonds more fully and emphatically, and says that these securities are treated as negotiable by the commercial usages of the whole civilized world, and have received the sanctions of judicial recognition, not only in this court, but of nearly every State in the Union, is well known and admitted.

V. "That the court erred in deciding that the indebtedness shown by the coupons is liquidated in its nature, and in deciding that there is not a proper and correct remedy to enforce the collection of these coupons, at least to judgment at common law, otherwise than by mandamus; and in deciding that the power exists in this Circuit Court in such cases to ascertain the amount due on the coupons."

According to elementary authorities, mandamus would be the only proper, because the only *specific* and *efficient* remedy in such cases. It is not pretended that even if judgment were recovered against the county, the petitioner would be any nearer to the accomplishment of his purpose than he is now, because there is probably no property of the county liable to levy and sale upon execution. A judgment may go against the county, and yet the proceeding by mandamus must be resorted to to compel the Commissioners to levy and

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collect the amount, including interest and costs, unless they should then proceed without this compulsory process.

The law directs the commissioners to collect the amount of interest as it becomes due. We see no necessity for resorting to suit to ascertain the amount. It is merely a question of simple mathematics. Questions of law and of fact may be adjudicated in this form of proceeding, and grave constitutional questions and questions of fact of the highest import are constantly tried by this summary and extraordinary remedy whenever they are put in issue, as is shown in the cases already cited from the highest judicial tribunal in the nation. It is a high prerogative writ, and is awarded only in cases where there is a clear legal right and the party has no other *adequate remedy* as against the same party. Here the statute directs the County Commissioners to proceed to do a specific thing, to-wit: to levy a tax and collect it. The amount is as well known to them through their own records as it would be by means of the judgment of a court. It is a duty required of them in their official character. They are not personally liable for the indebtedness, but may be punished for neglecting to obey the process of the law after being commanded to obey, and the law does not contemplate satisfaction in other manner than by the levy and collection of a tax and the payment of the money when so collected. A judgment would only affirm a *right* already established—the *remedy* is something more. It is the satisfaction of the right or claim already fixed, the *legal* obligation only being disputed.

Judge Bronson, in *McCullough vs. The Mayor of Brooklyn*, 23 Wend., 458, says that “although, as a general rule, a *mandamus* will not lie where the party has another remedy, it is not universally true in relation to corporations and ministerial officers. Notwithstanding they may be liable to an action on the case for neglect of duty, they may be compelled by *mandamus* to exercise their functions according to law.” The opinion of the Supreme Court of Pennsylvania,

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in *The Commonwealth vs. The Select and Common Council of Pittsburgh*, composed of D. F. and others, 34 Penn., 496, covers the whole ground.

After stating a case similar to the present in its main features, Judge Strong, in delivering the opinion of the court, says: "We shall spend no time in endeavoring to prove what is apparent upon the face of this statement of facts, that it presents a fit case for a *mandamus*. Here is a clear legal right in the relator, a corresponding duty in the defendants, and a want of any other adequate and specific remedy. No action at law would lie at the suit of the relator against the defendants for not making provision for the payment of the interest, for not levying and collecting a tax, which is the thing sought to be accomplished by this writ. That an action might be brought against the city upon the bonds themselves is true, but that is not the right here asserted, nor would it enforce the duty alleged. The liability of the city to pay the bonds is one thing, the duty of the councils to make provision for their payment is quite another. The City Councils are public bodies, and the members of the councils are public officers. Nothing is better settled than that *mandamus* is the appropriate writ by which the commonwealth compels the performance of a public duty. The propriety of this form of remedy, for such a case as this relator presents, was fully vindicated in *Thomas vs. Commissioners of Alleghany County*, 8 Casey, 218, and both English and American authorities were referred to in support of its use. Cases are numerous in which the writ has been sustained to enforce the levy and collection of a tax." *Queen vs. The Wardens of St. Savior*, 7 Ad. & Ellis, 925; *Queen vs. The Select Vestrymen of St. Margaret*, 8 Ad. & Ellis, 889; *Queen vs. Thomas*, 3 Com. Bench, 589; *Tapping on Mandamus*, 67, and *Moses on Mandamus*, 102 to 123, and numerous cases collected, fully sustain these positions.

VI. "That the court erred in refusing to make the Coun-

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ty Commissioners of Suwannee, Bradford and Baker counties parties to the proceeding," and

VII. "In giving its great power to enforce the collection of these coupons, because the State, without rendering just compensation, took from Columbia county over one-half her territory and all her slaves, which property, by a contract with the State, was pledged to pay this indebtedness now sought to be collected in this proceeding."

It does not appear that any effort was made in the Circuit Court to cause the commissioners of Suwannee and the other counties to be made parties, and that the court refused. But it is not considered that it was necessary, even if it were demanded by the appellants. One writ of *mandamus* could properly go against the officers of but one county. These bonds were issued by the officers of Columbia county. The relator holds the obligation of that county, and has no direct legal claim against the new counties.

"Public corporations are such as are created by the government for political purposes, as counties, cities, towns and villages; they are invested with subordinate legislative powers, to be exercised for local purposes connected with the public good, and such powers are subject to the control of the Legislature of the State." 2 Kent's Com. Lecture, 33, p. 275. "In respect to public corporations, which exist only for public purposes, as counties, cities and towns, the Legislature, under proper limitations, have a right to change, modify, enlarge or restrain them. A public corporation, instituted for purposes connected with the administration of government, may be controlled by the Legislature, because a corporation is not a contract within the purview of the constitution of the United States." *Ib.*, 305. "The right to establish or abolish such corporations, seems to be a principle inherent in the very nature of the institutions themselves, since all mere municipal regulations must, from the nature of things, be subject to the absolute control of the government." Angel & Ames on Corp., sec. 31; Hooper

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vs. Emery, 14 Me., 377. There is no question of the right of the Legislature to divide counties already established, and to form new counties out of portions of their territory. 38 Me., 41.

After the issuing of the bonds by the county of Columbia, the Legislature severed a part of her territory and created from it the counties of Suwannee and New River. The name of the latter was subsequently changed to Bradford, and a portion of it set off into the new county of Baker.

In the division of Columbia county, (Laws of 1858, page 39.) it was provided that the commissioners of Columbia county should set apart and transfer to each of them so many shares of the capital stock of the Atlantic and Gulf Central Railroad Company as should be necessary to constitute a fair division between the three counties of the ten-thousand shares of said stock held by Columbia county, to be determined by the amount of taxable property within the limits of each as appeared by the assessment made next preceding the transfer; and that Suwannee and New River should, on making such transfer of stock, deliver to Columbia county bonds with coupons attached, to be made payable at periods corresponding with the bonds of Columbia county. And it was made the duty of the County Commissioners of Suwannee and New River, from time to time, to levy and collect such a tax as should be necessary to meet the interest and the bonds as they become due, and in case of failure of the new counties to collect the tax and pay the bonds and interest, then it should be done, as heretofore, by the assessor and collector of Columbia county.

It is, therefore, seen that the inhabitants and property taken from Columbia county were not relieved from their liability to pay their just proportion of the indebtedness of the old county of Columbia, and a means was provided for compelling payment of their share of it. If they neglect or refuse, or if physical obstacles are interposed to prevent the execution of the law, the commissioners of Columbia have

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the same right to appeal to the courts and compel obedience as other suitors.

The severance of a portion of the county did not relieve the county of Columbia from its indebtedness or any part of it, for upon general principles of law, as well as by judicial construction of statutes, if a part of the territory and inhabitants of a municipal corporation are separated from it, the remaining part retains all its property, powers, rights and privileges, and remains subject to all its obligations and duties, unless some express provision to the contrary should be made by the Legislature, (*Hampshire vs. Franklin*, 16 Mass., 86;) and it is within the province of the Legislature to provide for an equitable apportionment or enjoyment of property formerly held, or to impose upon each portion of the divided territory the payment of a share of the corporate debt, and if no such legislative provision be made, it has been held that upon the division the old municipality will be entitled to all the public property, and solely answerable for such liabilities. This was held by Parsons, C. J., in *Windham vs. Portland*, 4 Mass., 384, and in *The Inhabitants of Yarmouth vs. Skillings*, 45 Me., 133. To hold that by the division of her territory the county of Columbia was discharged from the obligation to pay a debt, would be to sanction an act of the Legislature impairing the obligation of contracts. The division of the county did not divest the county or its citizens of any of their property or rights, or relieve them of any of their obligations. Had this been the necessary effect of the act of the Legislature in dividing the county, the act would doubtless be treated as unconstitutional and void.

That the political action of the people of the State or of the government of the United States, or that the occurrence of a general commotion had the effect to abolish slavery and thus destroy a species of property hitherto recognized as valuable merchandise, and thus impoverish a large number of individuals to the extent and value of that property, cannot, upon

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any recognized principle of law or equity, have the effect to relieve the community of their pecuniary obligations. As well may it be said that the misfortune of any business man in the destruction of his property would relieve him and discharge his liabilities, however much he might be embarrassed, and perhaps rendered unable to meet them. Nor do we perceive how the State can be substituted as the debtor, and liable to pay the debts of the county, by the action of the Legislature in changing her boundaries, or by the action of the people in destroying the element of property in a laborer.

VIII. "The court erred in permitting its power to be used to enforce the collection of this indebtedness out of the county until the one hundred thousand dollars of stock had been absorbed, that stock being by law reserved subject to a lien in favor of the bondholders."

We do not understand that this bonded indebtedness was a lien upon the stock. There was a provision in the law that the stock should not be assigned by the county until the bonds should be paid, except in exchange for such bonds. The county then was *authorized* to exchange the stock for the bonds, but the holders of the bonds had no lien thereon. The law provided that tax-payers should be entitled to stock in return for taxes paid, and if any lien existed, it was thus in favor of the tax-payer. The county, or the commissioners, were, *ipso jure*, trustees, holding the stock for those who should become entitled to it in the manner provided until the bonds should be discharged.

IX. "The court erred in deciding that the limit allowed by law for levying taxes for county purposes does not affect the tax to pay this peculiar indebtedness, and that this specific tax is outside and independent of other general taxes."

This is not a new question. These cases of the issuing of bonds by municipal corporations on railroad stock subscriptions have very uniformly resulted in the loss to the corporation of the stock subscribed for, and in an effort to evade

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and defeat the collection of the bonds and the coupons, or interest warrants. In *Van Hoffman vs. The City of Quincy*, decided by the Supreme Court of the United States, (4 Wallace, 535,) a large number of cases are referred to of a similar character. That case was like the present, on a petition for a *mandamus* by the holder of coupons against the city of Quincy, Ill., which, when issued, were attached to bonds delivered in payment for the stock of railroad companies subscribed for by the city under acts of the Legislature of 1851 and 1853, by the provisions of which acts the city was authorized to collect an annual special tax to pay the interest on the bonds. The city failed to pay the coupons, and refused to levy the tax. In February, 1853, the Legislature passed a law providing that the taxes to be levied by the city should not exceed eighteen cents on the hundred dollars without the concurrence of a vote of the citizens, and not more than fifty cents in that event, and repealing all other laws authorizing the collection of taxes except those regulating the manner of collection. The answer averred that the full amount of the tax authorized by this act had been assessed, and that the power had been exhausted, and that the fifty cents, when collected, would not be sufficient to pay the current expenses of the city, &c. The relator demurred to the answer, and the question presented was, whether the act of February, 1853, impaired the obligation of the contract, and was therefore void within the tenth section of the first article of the constitution, which prohibits any State from passing such an act, and whether, if it did so, a *mandamus* would lie against the city to compel it to levy a tax to pay the debt. The case was argued by counsel of eminence, and the briefs were exhaustive. After referring to the cases of *Fletcher vs. Peck*, 6 Cranch, 87, *New Jersey vs. Wilson*, 7 ib., 164, and *Terret vs. Taylor*, 9 ib., 43, the court remarks that "the principles which they maintain are now axiomatic in American jurisprudence, and are no longer open to controversy. It is also settled

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that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it as if they were expressly referred to and incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement." The cases of *Bronson vs. Kinzie*, 1 How., 297, and *McCracken vs. Hayward*, 2 ib., 608, are referred to, where, subsequent to a contract, laws were passed providing that property mortgaged or levied on under execution should not be sold for less than two-thirds of its appraised value, and such acts, so far as they affected prior contracts, were held to be void. So in *Sturgis vs. Crowninshield*, 4 Wheat., 122, a State insolvent or bankrupt law was held inoperative as to prior contracts. "It cannot be doubted, either upon principle or authority, that each of such laws passed by a State would impair the obligation of the contract, and the last mentioned not less than the first. Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the constitution against invasion. The obligation of a contract is the law which binds the parties to perform their agreement. * * One of the tests that a contract has been impaired is, that its value has been diminished by legislation. It is not, by the constitution, to be impaired at all. This is not a question of degree or cause, but of encroaching, in any respect, on its obligation, dispensing with any part of its force." This rule is held not to be infringed by a repeal of laws for imprisonment for debt, nor by exempting from sale under execution necessary implements of agriculture, the tools of a mechanic, and articles of necessity in household furniture. It is said "regu-

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lations of this description have always been considered in every civilized community as properly belonging to the remedy, to be exercised by every sovereignty according to its own views of policy and humanity." 9 Peters, 359; 12 Wheaton, 230; 12 ib., 373; 4 ib., 200. "These doctrines, (say the court in *Van Hoffman vs. City of Quincy*,) rest in this court upon a foundation of authority too firm to be shaken, and they are supported by such an array of judicial names that it is hard for the mind not to feel constrained to believe they are correct. * * When the bonds were issued there were laws in force which authorized and required the collection of taxes sufficient in amount to meet the interest as it accrued, from time to time, upon the entire debt. But for the act of February 14, 1853, there would be no difficulty in enforcing them. The amount permitted to be collected by that act will be insufficient, and it is not certain that anything will be yielded applicable to that object. To the extent of the deficiency, the obligation of the contract will be impaired, and if there be nothing applicable, it may be regarded as annulled. A right without a remedy is as if it were not. * * It is clear that where a State has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The State and the corporation are, in such cases, equally bound. The power given becomes a trust which the donor cannot annul, and which the donee is bound to execute, and neither the State nor the corporation can any more impair the obligation of the contract in this way than in any other. * * A different result would leave nothing of the contract but an abstract right of no practical value, and render the protection of the constitution a shadow and a delusion." See *People vs. Bell*, 10 Cal., 570; *Dominic vs. Sayre*, 3 Sand., 555; *City of Galena vs. Amy*, 5 Wallace, 705.

Upon the principle of these authorities, (and that they are

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authoritative expositions of constitutional law no one can question,) we must hold that the act known as the Internal Improvement Act authorized the counties to levy and collect a tax sufficient to pay the interest annually accruing upon the bonds referred to, and to meet the principal of the bonds when due, or to create a sinking fund for that purpose, and to that end, if the law already in force did not authorize the collection of a sufficient amount, that act enlarged the power of the County Commissioners to that extent, and that any subsequent legislation restricting the amount to be raised, so far as it prevents the board from levying a sufficient amount, is inoperative with respect to the bonds and interest warrants in question.

We have thus disposed of the various questions raised upon the argument of this case, and we have been relieved of the responsibility of treating of the principle matters as original questions, finding as we do, in the reports of the decisions of the highest courts of the several States, and of the United States, that every important question raised has been repeatedly considered and decided, with scarcely a shade of difference in the views of learned judges.

It is idle to lament at this late day the rampant spirit of speculation which a few years ago busied itself with preying upon the credulity of the people everywhere; painting glowing pictures of the golden flood of prosperity that was promised as sure to follow the speedy construction of railroads throughout the country; of the safety of investment in them, of the certainty that they would not only in a brief period return the money invested, pay the interest and redeem the bonds issued, upon which the means were raised to construct them, and yield the holders of stock, who supposed they were in possession of that which would soon give verity to their dreams of opulence, a handsome income at trifling cost. The result almost every where has been uniform. Were the people even told that these promises were delusive, and that in the end they would be called upon to pay all that was

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"nominated in the bond," it was not believed; and even if they were advised that the bonds were unauthorized and void in the law, they would have scorned the intimation that they would ever attempt to repudiate them; yet in the light of subsequent results and under the stress of multiplied misfortunes, with these debts forming dark clouds over their homesteads and over the heads of their children, it is not strange that they seek to withdraw themselves from beneath the heavy burthen and to seek relief in any quarter where a ray of hope might present itself. Yet the Judiciary of the State would be liable to the charge of bad faith, if these bonds and the law were decided to be constitutional and binding before the transfer of them, and after their transfer in good faith, relying upon such adjudication and the acquiescence of the people, and when the railroad company had disastrously failed, and all hope of an efficacious recourse was gone, the decision should be altered and they should be pronounced unconstitutional and invalid.

The fact that the calculations of the benefits to be derived from the subscription were delusive, that the experiment was unfortunate, that the enthusiastic hopes cherished by the citizens as to the advantages contemplated have been blasted, may excite the sympathy of the country in their behalf, but they can constitute no excuse for a court of justice in refusing to administer the law alike to all persons, and at all times. No individual can be excused from the payment of his debt because the business in which he embarked has proved a failure. "The world is full of people involved in debt by reason of miscalculations or misfortunes in business. It is one of the certain penances for indebtedness contracted with good motives and apparently well grounded hopes, that the party indebted must, in case of adversity, practice prudence and economy, and wearily, but patiently, toil through years to extinguish it. It is matter of regret that the burthen of paying this debt in form of a tax falls upon the property of citizens with more than the weight of personal obligation,

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yet this is the mode pointed out by the law, and the people have, through the Legislature and at the polls, imposed it upon themselves, and the consequences cannot be averted by the courts. In the progress of events, and with brighter times, better fortunes await them."

In the third ground assigned for error, the appellants make the point that the claim of interest upon the coupons is in violation of the usury laws. We could not arrive at that conclusion, as there was no usurious agreement at the time of issuing the bonds, the rate contracted for being within the law. Mr. Justice Swayne, in delivering the opinion of the court in *Gelpcke vs. The city of Dubuque*, cited *supra*, has this single suggestion in relation to interest upon coupons: "Bonds and coupons like these, by universal commercial usage and consent, have all the qualities of commercial paper. If the plaintiffs recover in this case, they will be entitled to the amount specified in the coupons, with interest and exchange as claimed." And he refers to *White vs. the V. & M. R. R. Co.*, 21 How., 575, and *Com'ns of Knox vs. Aspinwall*, ib. 539, as authorities. The case of *Gelpcke vs. city of Dubuque* was an action against the city to recover the amount due on coupons with interest thereon.

In examining carefully the ample briefs printed with the case, we do not discover that the question of interest was mooted. The only question was as to the constitutionality of the act of the Legislature of Iowa authorizing the issue of the bonds. The cases cited were also suits instituted to recover judgment upon coupons, nothing being said in either of them about interest thereon, the only questions presented being the constitutional power to issue the bonds, and whether the bonds were negotiable so that any holder might maintain suit; both of which questions were answered in the affirmative. In examining all the cases cited by the relator in this case, and all we have been able to find, (and they are somewhat numerous,) the question of allowing interest upon coupons or interest warrants, is not determined by the Su-

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preme Court of the United States, except by the dicta referred to in the opinion of Mr. Justice Swayne, and a case in 7th Wallace, which again refers to that opinion *as authority*, and we are inclined to think the remark was thrown in as inferential, in connection with the suggestion that this species of paper "has all the qualities of commercial paper." Because these bonds and coupons payable to bearer are negotiable, and may pass from hand to hand like commercial paper, it does not follow, as we are inclined to think, that they have *all* such qualities.

The allowing of interest upon interest, when it comes due at certain stated times, is allowed in Massachusetts, as upon instalments of money payable annually. And Judge McLean, in *Hollingsworth vs. the city of Detroit*, 3 McLean, 472, held that interest was recoverable upon coupons of the bonds of the city, but it is put mainly upon a statute of Michigan. The current of authority in England and in this country, however, is against the allowance of interest upon interest, or compound interest, unless there be a contract to pay it made after it accrues.

The coupons annexed to the bonds in question are by no means independent contracts for the payment of money, although they may be treated in commercial circles as negotiable and payable to the holder. The contract to pay interest is *in the bond* and nowhere else. The coupon is a memorandum showing the amount of interest due by the bond, and is an invention of convenience. It purports on its face to be a simple ticket showing how much interest is due on a given day upon the principal sum, and where it must be paid.

Besides, the act authorizing the issuing of these bonds does not expressly authorize the issuing of coupons having the qualities of new contracts, but we do not see that there is anything in the acts to prevent the making of these instruments for the purpose intended, to-wit: a convenient mode of adjusting the interest from time to time; yet the act does

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not authorize the County Commissioners to agree to pay compound interest, and they are certainly limited in this respect by the authority conferred.

The Commissioners are required to levy and collect taxes to meet the interest *on the bonds*, and this does not authorize them to levy and collect taxes to pay interest upon interest. The contract by an agent is controlled by his authority, as derived from his principal or from the statute, and the agent in this case could make no contract not contemplated by the law, or within the scope of his authority. The law being an essential part of the contract, all parties have notice of its provisions.

We therefore hold that it was error to direct the County Commissioners to collect more than the interest due upon the bonds. That is all that the law requires of them, and therefore that is all that the court can require of them in this proceeding, even though we were to conclude, if a suit at law were to be brought upon the coupons, that interest upon them might be recovered.

At the conclusion of the argument, it was suggested that the interest claimed was computed at a rate greater than should be allowed, and a motion was thereupon made by the relator that the peremptory writ might be amended and the error corrected, if there be one in that respect.

But the alternative writ stands as the pleading on the part of the relator, and if he asks too much, the respondents may show this as a sufficient cause for not complying with the mandate of the alternative writ of mandamus. According to the conclusions at which we have arrived, interest upon the coupons not being allowed, the peremptory writ was erroneous in that respect.

The order for the peremptory writ must be reversed and set aside, and the relator may amend the alternative writ by remitting the claim of interest upon the coupons, and he will be entitled to a peremptory mandamus.

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THE COUNTY COMMISSIONERS OF COLUMBIA COUNTY, APPELLANTS, VS. ALEXANDER DAVIDSON, APPELLEE.

Appeal from the Circuit Court of Columbia county.

R. W. Broome and *S. L. Niblack* for Appellants.

J. J. Finley and *Wm. Bryson* for Appellee.

RANDALL, C. J., delivered the opinion of the court.

This case differs only in the amount claimed from the case of the same Appellants against Charles R. King.

For the reasons given in the opinion of the court in that case, the order awarding a peremptory writ of mandamus must be reversed and set aside, and the relator may amend the alternative writ by remitting the claim of interest upon the coupons, and he will be entitled to a peremptory writ of mandamus.

CALVIN L. ROBINSON, APPELLANT, VS. F. F. L'ENGLE, ADMINISTRATOR OF W. J. L'ENGLE, DECEASED, APPELLEE.

1. It is not necessary under the laws of this State, that a bill of exceptions in civil causes should be sealed by the Judge, the signing by him is sufficient.
2. A memorandum made by the Clerk of the Court, in taking down the testimony of witnesses, as that certain questions were asked and not allowed by the court, and exceptions taken, is not a part of the record and does not dispense with the preparation and signing of a bill of exceptions, in order to bring the matter before the appellate court.
3. In an action upon an express covenant in a lease for the payment of rent, and without conditions, a plea that the lessee was "deprived of the beneficial use of the premises by the casualties and violence of war,"

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does not show a defence to the action. The loss of the use of premises by fire, inundation, or external violence, will not exempt the tenant from his express contract to pay rent.

4. Where a plea is overruled on demurrer with leave to defendant to amend, and taking no exception to the ruling of the court, he files an amended plea, he thereby abandons his first plea and waives his right to take advantage of the ruling of the court upon the demurrer, and cannot assign it for error.
5. An offer to perform in part the covenant to pay rent, on condition that the lessor will abate the residue of the rent, to-wit: the rent accrued during the time the tenant was deprived of the use of the premises by the violence of war, is not a legal defence, nor a "defence upon equitable grounds" under the statute.
6. A plea of *set-off* of damages sustained by defendant growing out of a conspiracy against him, entered into by plaintiff and others, will not be sustained on demurrer. A set-off can be allowed in an action on contract, of matters only growing out of contract, express or implied.

This was an action of covenant commenced by the appellee (plaintiff) against the appellant, in the Circuit Court of Duval county in 1866. The declaration sets out the terms and conditions of a lease executed on the first day of October, 1859, by Wm. J. L'Engle of one part, and C. L. Robinson of the other, under their hands and seals, whereby said W. J. L'Engle demised to appellant the east-half of water lot number 26, in Jacksonville, for the term of ninety-nine years, at the annual rent of \$160, payable semi-annually in advance, the appellant to pay all taxes, &c.; and Wm. J. L'Engle having died, F. F. L'Engle, his administrator, brings suit to recover the arrears of rent alleged to be due thereon.

On the 5th of August, 1867, appellant, by his attorney, filed six pleas, and on the 14th of September, an additional plea. On the 8th of October plaintiff demurred specially to each and every of the pleas. On the 11th of October the demurrer was sustained as to each of the pleas except the 4th, and leave was given by the Judge to appellant to amend his plea, and to the plaintiff to reply to the 4th plea.

On the same day, October 11th, 1867, the appellant filed his amended pleas, to-wit:

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I. No rent in arrear.

II. Eviction by plaintiff.

III. Payment.

IV. Set-off against plaintiff, administrator, for goods sold and delivered.

V. "That he was deprived of the beneficial use of said premises by the casualties, accidents and violence of the late war between the so-called Confederate States and the Government of the United States, from the first day of April, 1862, to the first of October, 1865."

VI. "For a defence upon equitable grounds, defendant says, that he offered at divers times in 1866 to re-occupy the premises and perform his covenants, provided the plaintiff would abate the rent during the period he was deprived of their use, as aforesaid, which plaintiff refused to do."

To the fourth plea, first pleaded, and to the first, second, third and fourth of the amended pleas, the plaintiff joined issue and demurred to the above 5th and 6th amended pleas, on the ground that they do not set forth any sufficient legal defence, and because the 6th plea sets forth no ground for equitable interference under the statute, &c.

On the said 11th of October, the court sustained the demurrer, and the following endorsement appears on the back thereof: "Demurrer sustained to pleas Oct. 11, 1867. Defendant's counsel excepts to the ruling of the court sustaining the demurrer. Exception noted Oct. 11, 1867.

"B. A. PUTNAM, Judge."

Dec. 7, 1868, appellant filed two additional pleas, to-wit: "That plaintiff's intestate in his life-time, and the plaintiff administrator since the death of the intestate, to-wit: about the 10th of April, 1861, entered into a conspiracy with divers other persons against defendants, whereby he sustained damages to his property to the amount of \$50,000, which he is willing to set off against plaintiff's claim."

And further: "That Wm. J. L'Engle, intestate, on or about the 10th of April, 1861, entered into a conspiracy

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with divers persons against defendant, whereby he sustained great damage and injury," to-wit: \$50,000, which he is ready to set off to the extent of plaintiff's claim, &c.

To these pleas a demurrer *ore tenus* was interposed and sustained, as appears by an endorsement thereon as follows: "Demurred to *ore tenus*. Demurrer sustained. Exception taken by defendant's attorney. A. A. KNIGHT, Judge."

A paper is appended to the record, which is entitled a "Bill of exceptions taken by defendant," and is as follows:

"1. Defendant excepts to the ruling of the said court sustaining the demurrer of plaintiff to the defendant's fifth and sixth pleas, endorsed as amended pleas and filed in the above cause October 11, 1867.

"2. Defendant excepts to the ruling of the said court sustaining the demurrer to defendant's plea put in as an amendment to his several pleas and filed September 14th, 1867.

"3. That the court erred in sustaining the demurrer to defendant's pleas, filed in said cause December 7, 1868, and endorsed as additional pleas, which were demurred to *ore tenus*.

"4. The court erred in this, that defendant offered to prove, by Francis F. L'Engle, that the said L'Engle was the agent of Wm. J. L'Engle in 1861, in the lifetime of the latter, and that the court ruled that the said F. F. L'Engle was not a competent witness to prove that agency; and defendant, by his counsel, H. Bisbee, Jr., stated to the court that he desired to prove such agency as a foundation for evidence that the said F. F. L'Engle, agent of W. J. L'Engle, opened an account with defendant and purchased goods and merchandise of the defendant under the agreement that the said goods should be applied towards payment of the rent accrued and accruing upon the lease, the subject of the said suit.

"5. The court erred in this, that defendant was put upon the witness stand and interrogated as to what time he (de-

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fendant) was evicted or expelled from the half lot in question in this suit, and the court ruled out the interrogatory.

"6. The court erred in this, that defendant put Charles L. Mather upon the witness stand and asked him if he, as clerk of defendant, opened an account with Francis F. L'Engle, representing himself as the agent of William J. L'Engle, and that the court ruled out the question as being improper to prove agency.

"7. The court erred in this, that E. M. L'Engle, plaintiff's attorney, was sworn and asked whether or not he knew that F. F. L'Engle had a power of attorney constituting him the agent of W. J. L'Engle in his lifetime, and that the court ruled that the said E. M. L'Engle, attorney of plaintiff, was protected from answering said question on the ground that it was a privileged communication from his client, the plaintiff in the said suit."

"Allowed, with the exception of the first two exceptions, which rulings were made by my predecessor, and for which I am not responsible. December 18, 1868.

"A. A. KNIGHT, Judge."

"The ruling of the court, in refusing to allow the first two exceptions, was duly excepted to and exception allowed. December 18, 1868.

"A. A. KNIGHT,

"Judge Fourth Judicial District."

Verdict and judgment for plaintiff, from which the defendant appealed.

H. Bisbee, Jr., for Appellant.

1. Defendant, lessee, appellant in this court, is not bound to pay rent for the time he was deprived of the use of the premises by the casualties and violence of war. 1 Hill. Abridgment, p. 163, sec. 7; 4 McCord, (S. C.,) 447; 1 Bay, (S. C.,) 491; 1 Dallas, 210. The equity of the rule in the last cited case is applicable to the case at bar.

2. This suit was brought to recover for the use of property within the meaning and intent of the 6th section of the

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act of Congress of July 17th, 1862, pleaded by defendant, and is a complete bar to plaintiff's claim. 12 U. S. Stat. at Large, p. 591; 2 Brightly, 195—6.

3. Set-off of damages, resulting from the conspiracy pleaded by defendant, is a legitimate subject of set-off under the laws of the State of Florida. Thomp. Dig., 347. *Demand*, used in the statute, is a term of more extensive meaning than any other known to the law. Co. Litt., 291; 2 Hill, (N. Y.,) 220; 6 Watts & Sergeant, 226; 9 Serg. & Rawle, 124.

4. An agent is a competent witness to prove the *fact* of his agency, to prove the making of contracts, and to prove his own authority, if it be by parol. 6 Fla., 52; Greenl. Ev., 1 vol., sec. 416, last of paragraph; 10 Serg. & Rawle, 251; 7 Term, 480; 2 East, 458; 9 Cush., 338.

5. Defendant was a competent witness to prove his eviction and the time thereof. Laws of Florida, 1865-6, p. 35.

6. Defendant's clerk, Charles L. Mather, was a competent witness to prove the agency of plaintiff in question, and the set-off pleaded and payment.

7. The plaintiff's attorney, E. M. L'Engle, was not protected, on the ground of privileged communications, from testifying as to the *fact of the existence* of the power of attorney mentioned in the seventh exception, though he may be privileged from testifying as to the contents of the same. 17 Johns., 335; 18 ib., 330; 1 vol. Greenl. Ev., sec. 241, and cases cited in note 1.

The words, lease and demise, contained in the lease in question, import an implied covenant of quiet enjoyment, and every grant implies that the thing granted shall be beneficial to the grantee. Washb. Real Prop., 325; 4 Cushing, 24.

E. M. L'Engle for Appellee.

Every fair intendment is to be made in support of the judgment below.

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When there is no bill of exceptions to show on what ground the court decided, it will be presumed that it decided correctly.

Unless the testimony in the case is brought before the Supreme Court by a bill of exceptions, it cannot regard it. 6 Fla., 516; 5 ib., 465; 9 ib., 422; 5 ib., 276; 8 ib., 143; 11 ib., 137, 140; 1 ib., 297; 16 Peters, 318.

The paper purporting to be a bill of exceptions in this case is really exceptions filed by defendant's counsel, (or required to be filed by Rule 13 of the Rules of the Supreme Court,) though these exceptions are signed by the judge below instead of by counsel. There is no bill of exceptions, the paper purporting to be such does not follow the form of a bill of exceptions, is not sealed by the judge, has not the evidence incorporated in it, and has not been ordered by the court to be made a part of the record, which are the requisites of a bill of exceptions. 1 Wallace, 592; 20 How., 427; 9 Fla., 422; 6 ib., 516; 5 ib., 465; 3 ib., 114; 11 ib., 137, 140; 3 Black., 372.

Unless there be a bill of exceptions, the court cannot hear the case, or rather any exception founded on matter not of the record. Foregoing authorities.

The first point of exception made by the defendant is upon the ruling of the court sustaining the plaintiff's demurrer to defendant's fifth and sixth pleas, filed October 11, 1867.

In support of the correctness of the ruling of the court below, I cite among many authorities, 3 Kent's Com., 465, 467, and cases cited; Alleyn, 27; 3 Johns., 44; 18 Vesey, 115; 1 Dallas, 210; 6 Mass., 63; 2 Wallace, 1, and cases cited; 19 Wendell, 500; 4 Paige, 355; 3 Dutcher, (N. J.) 515.

The only cases contra that I have been able to find, are Ripley vs. Wightman, 4 McCord, 447, and Bayley vs. Lawrence, 1 Bay, 449, (the latter case a mere memorandum and very unsatisfactorily reported.)

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The law seemed to be well settled against these dissenting authorities. The decisions, English and American, have a remarkable unanimity.

As to the demurrer to the sixth plea, I cite section 69 of the act approved February 8th, 1861, to amend the pleading and practice in the courts of Florida. The facts set up in said plea are not such as, judgment having gone against defendant, would entitle him to relief in equity against such judgment. That is the criterion of the plea provided for by this section of the statute. 4 Paige, 355; 18 Vesey, 115.

The second point of exception by defendant is to the ruling of the court sustaining the demurrer to defendant's plea, put in as an amendment to his several pleas, and filed September 14, 1867. The record shows no exception taken at the time to the ruling of the court below, therefore it cannot now be considered. 16 Peters, 318; 6 Fla., 306; 19 How., 66; 1 Wallace, 592.

By his subsequent pleadings (December 7, 1868,) the defendant waived his exceptions to the rulings of the court on the demurrers, and the point cannot be considered in this court. 8 Fla., 206; *ib.*, 453.

The third point of exception by defendant is to the ruling of the court sustaining the demurrer to the additional pleas filed December 7, 1868.

These pleas are bad, because the first one seeks to make acts of the plaintiff, in his personal character, affect his right to recover in his representative character; because they seek to charge the intestate, after his death, with unlawful acts (conspiracy) alleged to have been committed before his death, and to try such issues collaterally; because they seek to charge the intestate's estates with unlawful acts committed by other persons than intestate.

The matter complained of is not a subject of set-off. Mere tortuous acts of the landlord, wholly independent of the covenants of the respective parties, cannot be set up as a

defence to an action for rent. Sedgwick on the Measure of Damages, 441; 4 Sand., (S. C.,) 120.

Demands arising *ex delicto* cannot be set off against those arising *ex contractu*. 2 Parsons on Contracts, 241, and cases cited.

The plea of set-off should, in substance, be as full, clear and definite as a declaration. 2 Parsons on Cont., 252.

These pleas now under consideration have not these qualities. They do not apprise the plaintiff of the demand that he is to meet. The damages claimed are too great. Sedg. on Damages, 65, 68; 16 John., 122; 1 Chitty's Pl., 338; ib., 395, 399; 5 Wend., cited in Sedg., 65.

"Conspiracy" is a technical term in criminal law. It is an agreement between two or more persons falsely to indict or procure the indictment of another. More generally, a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful, by criminal or unlawful means. The word describes an indictable offence. Burr. Law Dictionary, title "Conspiracy."

If it has application to any combination not unlawful, such meaning should not be put upon the word as used in the pleas, because that construction of a pleading should be adopted which is most unfavorable to the party pleading. Stephen on Plead., 378.

Such construction being necessarily put upon the term "conspiracy" used in the pleas, the fact alleged is not susceptible of issue, because it would be putting a man on trial after his death for an alleged offence committed in his lifetime. Nor can the fact be inquired into collaterally, nor in a civil action, and without indictment or presentation by a grand jury.

Though a demurrer *ore tenus* may not be strictly regular, the judgment will not be reversed because the court below allowed it, (especially when the defendant made no exception to the *manner* in which the demurrer was interposed,

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but only to the ruling of the demurrer,) if justice would not be subserved thereby. 1 Wallace, 598.

When a judgment effects the proper results, no matter by what erroneous reasoning it may have been induced, it will not be reversed. 11 Ala., 149.

Whilst the ruling of the court may be erroneous in some respects, the court will not reverse the judgment if the verdict is sustained by the evidence. 6 Fla., 482.

No exception is taken to the allowing of the demurrer to be interposed *ore tenus*, but only to the sustaining of it, and the argument must be confined to that point. Rule 13 of the Rules of the Supreme Court.

The other exceptions, being the fourth, fifth, sixth and seventh points, cannot be heard, because they relate to rulings upon evidence, which evidence and the rulings upon it are not brought up by bill of exceptions, sealed and ordered to be made part of the record. Authorities cited *ante*.

The witnesses offered to be introduced by defendant, referred to in the fourth and fifth exceptions, and whose testimony was rejected, were respectively the plaintiff and defendant in the action. They are incompetent witnesses, by the proviso of the 2d section of the act of 1865, concerning testimony. Pamphlet Laws of Florida, 1865, p. 35.

Sixth exception.—The acts or declarations of one calling himself the agent of another cannot affect his alleged principal, unless such acts or declarations be brought to the knowledge, actual or implied, of the other party and receive his assent. The rule of evidence, "*res inter alios acta alteri nocere non debet*," applies.

Seventh exception.—1 Greenleaf on Evidence, sec. 236, 240. The agency of Francis F. L'Engle was shown by the lease to defendant, offered in evidence by the plaintiff, which was signed and sealed "Wm. J. L'Engle, by F. F. L'Engle, his attorney." By offering that in evidence, the plaintiff admitted that Francis F. L'Engle was the agent of Wm. J. L'Engle.

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That was the best evidence, and the attempt to prove the fact by the question to plaintiff's counsel was a violation of the rule against secondary evidence. If the witness had answered affirmatively, he surely could not have been interrogated as to the contents of the letter of attorney. It is not shown that any notice was served upon plaintiff to produce such letter of attorney, or that application of any kind was ever made for it, or that plaintiff ever refused to produce it. Greenl. on Ev., ch. 4, *passim*.

If the foregoing points and authorities are well taken and applicable, the appellee claims that the judgment of the court below should be affirmed. 5 Fla., 11 Fla., 6 Fla., and others.

The constitutional provision that all testimony shall be reduced to writing, signed by the witnesses and filed with the papers, does not make such testimony a part of the record and dispense with the necessity of the bill of exceptions for bringing the evidence before the appellate court. 20 How., 433, *et seq.*; 1 Wallace, 592; 8 Fla., 9; Smith's Com. on Stat. and Const. Law, p. 627, 676-7, 690-1, 693, 771, 831-3, 835-8, 879.

The interpretation and construction of constitutional provisions are governed by the same rules and principles. *Ib.*, sec. 702.

RANDALL, C. J., delivered the opinion of the Court.

The first point made by the appellee is that there is no bill of exceptions in the record, and that therefore the court cannot look into any of the matters assigned for error; that every fair intendment is to be made in support of the judgment below, and in the absence of a bill of exceptions showing upon what ground the court decided, it will be presumed that it decided correctly.

If it is true that there is not a bill of exceptions, the ground taken by the appellee is correct according to the uniform decisions of common law courts. The present court and the

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former Supreme Court of this State have repeatedly so held; and that unless the testimony in the case was brought before it by a bill of exceptions, it could not regard it.

“At common law a writ of error lay for an error in law apparent in the record, or for an error of fact where either party died before judgment; yet it lay not for an error in law not appearing in the record, and therefore when a party alleged anything, *ore tenus*, which was overruled by the judge, this could not be assigned for error not appearing within the record, nor being an error in fact but in law, and so the party grieved was without remedy.” 2 Inst., 426. To provide a remedy the statute of Westminster 2d was enacted, which provided that exceptions should be allowed under the seal of one of the Justices. It is claimed here that there is no bill of exceptions under the seal of the circuit judge. The first statute of Florida on the subject was enacted in November, 1828, (Th. Dig., 351, sec. 3,) and it requires only *the signing* of the bill of exceptions by the judge or if he refuse, then the signing by three bystanders. The act of Nov. 1829, one year afterwards, enacting the common and statute laws of England, provided that “said statutes and common law” be adopted except so far as they were not consistent “with the constitution and laws of the United States and the acts of the General Assembly of this State.” It seems clear that this act did not change or affect our pre-existing statutes, and as a consequence if a seal was not necessary before under the statute, it was not made necessary by the enactment of the English law.

The act of 1852 relating to appeals and writs of error, provided that the “exceptions shall be tendered to the judge for his *signature*, in the same manner, and under the same regulations and provisions as bills of exceptions are now made up, signed and made part of the record.”

The act of 1848, relating to writs of error in criminal cases, expressly requires the circuit judge to “sign and seal upon request any bill of exceptions taken” during the trial; but

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the statutes relating to civil proceedings nowhere require the sealing of the bill.

The Supreme Court of this State has often passed upon the sufficiency of bills of exceptions, but has never expressly ruled upon this point. It has several times quoted the statute of Westminster with reference to the office and effect of a bill of exceptions, but without considering the point here made.

The Court in *Bailey vs. Clark*, 6 Fla., 522, speaks of a bill of exceptions being "made up with care by the judge under the solemn sanction of his signature and seal," referring to the common law practice; but the court says on the next page: "our statute provides the *manner of procuring* a bill of exceptions, but leaves its *effect* to the statute of Westminster, which is one of the acts mentioned in our statute adopting the common and statute laws of England, with certain exceptions."

Mr. Justice Thompson, in a book which unfortunately has not yet been printed, says very decidedly in a note, that the statutes of Florida have dispensed with the necessity of sealing a bill of exceptions. The very common omission of the seal in preparing and perfecting bills of exceptions by the circuit judges and by the bar of this State, as appears by inspecting numerous records here, shows that a seal has not been considered indispensable.

So far as this question is concerned, we are of the opinion that the law is precisely what it would have been if the statute of 1829 had not been passed, and that in civil causes a bill of exceptions may be perfected without being sealed by the judge.

We therefore proceed to examine such questions as have been presented by exceptions which appear in the record signed by the judge. But we must say that we cannot regard the paper given above as a "bill of exceptions." It is merely an assignment of errors. It does not show that any exceptions were taken during the progress of the trial to the

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mlings of the court in excluding witnesses or refusing to hear evidence offered, nor at what stage of the trial the several alleged rulings were made as to the exclusion of witnesses, the relevancy of testimony offered, or its quality.

But according to the view we have taken as to what is sufficient to bring before this court the rulings in the court below, we shall consider the first, second and third errors assigned :

1. The fifth plea, to which a demurrer was sustained, alleges that the defendant was deprived of the beneficial use of the demised premises by the casualties and violence of war.

It will be only necessary to refer to authorities in determining the validity of this plea. Chancellor Kent (Com. 3, 495,) has examined and collated cases involving the question as to how far a tenant is excused from performing his covenants for the payment of rent, when he is deprived even by inevitable necessity or misfortune, and without any default on his part or on the part of the landlord, of the enjoyment of the premises. "In Paradyne vs. Jayne, (Alleyn's Rep., 26,) an action of debt was brought for rent upon a lease for years, and the defendant pleaded by way of excuse for the non-payment of rent, that he had been driven from the premises by public enemies, viz: by Prince Rupert and his soldiers. The case was fully and ably argued before the King's Bench during the time of the civil wars in the reign of Charles I. It was insisted that by the law of reason, a man ought not to pay rent when he could not enjoy, without any default on his part, the land demised to him, and that the civil and canon law exempted the party in such a case. But Rolle (author of the Abridgment,) overruled the plea and held that neither the hostile army nor an inundation would exempt the tenant from paying rent. The same doctrine has been held to this day, and it is well settled, that upon an express contract to pay rent, the loss of the premises by fire or inundation, or external violence, will not ex-

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empt the party from his obligation to pay rent. The case of Hallet vs. Wylie was decided on that principle; 3 Johns. 44; 3 Burr, 1638, and it is settled that a court of equity will not grant relief. 3 Anst., 687; 18 Ves. 115, where the court of equity refused to interfere in favor of the tenant who was considered as having no equity against the effect of his express covenant to pay the rent. * * It is to be observed that the case only applies to express agreements to pay, and if a party will voluntarily create a duty or charge upon himself, he ought to abide by it when the other party is not in fault, and when he might have provided, if he had chosen, against his responsibility in case of such accidents. The loss of the rent must fall either on the lessor or lessee, and there is no more equity that the landlord should bear it than the tenant, when the tenant has engaged expressly to pay the rent. * * Inevitable accident will excuse a party from a penalty, but will not relieve him from his covenant to perform." The case of Fowler vs. Bolt, 6 Mass, 63, is strongly in point; see also Gates vs. Green, 4 Paige, 355.

1 Hilliard's Abridgment, 463, sec. 7, cited by appellant, does not sustain his position. It merely says: "There are *some cases* where, although there is no actual eviction, yet the law will attach the same consequences *to the acts done*, viz: a discharge of the rent, the tenant having lost the use of the land." Holland vs. Shaffer, 1 Dallas, 210, also cited by him, holds the lessee to the performance of his covenant to pay rent; but excused, upon equitable principles, the agreement to deliver up in good repair. The case of Bayley vs. Lawrence, 1 Bay, 499, (So. Ca.,) seems to sustain the defence. That was covenant upon a lease of a ship yard at Hilton Head in 1774. The defence was that the lessee was driven off by the casualties of war, and deprived of the enjoyment. The whole of the opinion is in these words: "The defendant ought to pay for the time he peaceably enjoyed the premises, but not for any time he was prevented by the casualties of war." This was a fugitive case picked up by

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the reporter and inserted some years after it was decided, and does not appear to have been decided by an appellate court. Hilliard on Real Property, sections 17, 18, says, "If the tenant has expressly covenanted or agreed to pay rent, he still remains liable to an action of covenant or an action of debt. Thus, if an army enter upon the land and expel him, he is still bound to pay rent."

It is believed that in all elementary books touching the question, this is laid down as the settled doctrine. The conclusion, therefore, is, that the demurrer to the fifth plea was properly sustained.

As to the sixth plea, it simply avers that defendant has offered to perform his covenant in part if he may be excused from the residue. This is not a legal or equitable defence within the meaning of the statute.

II. The second error alleged is, that the court sustained the demurrer to the defendant's plea put in as an amendment to his several pleas, and filed Sept. 14th, 1867.

As has been already stated, Judge Putnam sustained the demurrer and gave defendant leave to amend, and defendant, on the 11th of October, filed an amended plea.

In *Ellison vs. Allen*, 8 Fla., 206, the court considered that a demurrer was improperly overruled, but says, "Still the defendant cannot, under the after proceedings had in this cause, be permitted to avail himself of this exception, for it is well settled that if a party, after judgment upon demurrer is given against him, goes on to amend his pleadings and makes an issue to the country, he thereby waives his exception to the judgment upon the demurrer, and will not be permitted to assign it for error in the appellate court. If the defendant had desired to have that ruling reversed by this court, he should have refused to go to the country, and have permitted the judgment on the demurrer to stand. Going to issue on the pleading operated as a waiver of the exception." 5 How., U. S., 29; *Morrison vs. Morrison*, 3 Stewart, 444. Indeed it is uniformly held that if a party

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whose pleading has been overruled pleads over, he thereby abandons the first pleading.

III. The third ground of error is that the court sustained the demurrer *ore tenus* to the pleas filed December 7, 1868, to-wit: a set-off of damages sustained by defendant growing out of a conspiracy against him entered into by the intestate and others.

The defendant insisted that he was entitled to set-off such claim under the statute, Th. Dig., 347, which reads as follows: "All debts or demands mutually existing, between the parties at the commencement of the action, whether the same be liquidated or not, shall be proper subjects of set-off and may be pleaded accordingly."

A set-off is in the nature of a cross action and may be pleaded in all cases in which, if a suit were brought upon the subject matter of the set-off, the demand of the other party may be set-off against it. This has never been allowed where the claim on the one side is assumpsit or debt, and on the other a trespass, or other action sounding in damages. The term "demand" as used, refers to matters growing out of contract, express or implied. The utmost confusion would be introduced if matters of trespass, assault, slander, and the like, were construed to be "demands" within the meaning of the law to be set-off against a debt; or, if in an action of slander or false imprisonment, a set-off of money due upon a promissory note or bond could be allowed. The next section shows what class of demands are intended. "In all actions to which the defendant may intend to plead a set-off, he shall at the time of filing the plea file therewith a true *copy or copies of the subject matter* of such set-off, and in case the jury shall find a balance for the defendant," &c. It is clear that the law refers to such demands as are usually the subject of set-off, to wit: arising out of contract. A *balance* clearly implies this. The defendant has encountered the difficulty of applying the term in this case. He has not "filed a *copy*" of his set-off, because it was impossible to do

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so. A "bill of particulars" of such a "demand" would be an anomaly. Damages growing out of some breach or fact connected with the subject matter of a contract, are allowed frequently by way of *recoupment*, as fraud in a sale, and matters of that character, but always relating to the subject matter of the plaintiff's action. The demurrer was very properly sustained.

The fourth, fifth, sixth and seventh errors assigned, relate to alleged rulings of the court in rejecting certain testimony offered, and upon the competency of witnesses.

The paper purporting to be a bill of exceptions, which has been given above entire, does not show that any exceptions were taken to the ruling of the court in the progress of the trial, as has been already stated.

Error lies only on exceptions taken to the ruling of the law by the judge, and to the admission or rejection of the evidence. Beyond this, we have no power to look into the bill on a writ of error, as it is a creature of the statute and restricted to the points stated. *Ex parte Crane*, 5 Peters, 199; 4 How., 298, 401, 292, 418, 541; 1 Starkie, 465; 3 Fla., 114; 5 Fla., 467; 6 Fla., 516; 11 Fla., 138; and the numerous authorities cited in these cases.

A bill of exceptions is defined as follows: If the bill be not tacked to the record, it should set out the whole proceedings previous to the trial, but otherwise it begins with the proceedings after issue joined, and in either case it goes on to state the circumstances upon which it is founded, as that a witness was called to establish certain facts or evidence offered, or challenge made, or demurrer tendered; the allegations of counsel respecting the competency of the witness, the admissibility of the evidence or legal effect of it; the opinion of the court, the exception of the counsel to the opinion, &c. Bull. N. P., 317; Field, 788; 2 Dunlap's Prac., 643.

But it is presumed that the counsel who prepared the bill in this case considered that the memorandum of the testi-



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mony signed by the witnesses and copied into this record, and the statement signed by the witnesses as to the rulings of the court and the exceptions taken thereto, was a part of the "record" and superseded the formal presentation thereof by means of a bill of exceptions. The present constitution of this State provides that "all the evidence" taken on a trial shall be written by the clerk under the control of the court, signed by the witnesses and "filed with the papers in the case."

Depositions in writing have always been allowed to be taken in this State, to be used on the trial, and were always "filed by the clerk with the papers in the case." Yet there has never been any exception made by the court in reference to this written evidence on file; it has always been required that it be presented on appeal or writ of error, by means of the bill of exceptions.

It is, however, beyond question that the clerk is merely required to reduce to writing *the evidence* to be signed by the witness. The constitutional provision does not require the clerk to note down everything that he may hear from the court and counsel. He may as well undertake to write down everything said by counsel in addressing the court or jury, and by the court to counsel or witnesses, as to note the questions, the objections and the ruling of the court. The witness is to sign the "*evidence*," and not the rulings of the court or speeches of counsel, though these be by chance incorporated in the body of his testimony. If the clerk's notes of the ruling of the court are to be taken as a verity, without the signature of the judge thereto, his blunders might work irreparable mischief. "Such a practice, (say the court in *Proctor vs. Hart*, 5 Fla., p. 470,) if sanctioned, would obviously lead to great looseness and uncertainty, and might work irreparable injury to parties litigant, for it would be to substitute the testimony of the clerk as to what was submitted to the jury for that of the judge, who alone is authorized to attest the matter. Indeed, it is beyond the province of

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the clerk in the exercise of his official duty to certify to the existence of any matter which is not a matter of record," &c.

The testimony as written by the clerk and signed by the witness, filed among the papers, is thus preserved, and it is thus rendered exceedingly convenient to prepare a bill of exceptions by means thereof; but as it is no part of the duty of the clerk to note everything that transpires on the trial, his memoranda of matters other than the evidence cannot be noticed, unless it be certified by the judge and made substantially a bill of exceptions, any recognition of such matters not certified by the judge would not be warranted by law.

We cannot, therefore, recognize the memoranda of the clerk, and as the paper purporting to be a bill of exceptions in this case does not show that exceptions were taken *at the trial* to the rulings of the court, we must decline to consider the 4th, 5th, 6th and 7th errors assigned, the matters referred to not being lawfully before this court.

The general exception to the refusal of the judge to sign exceptions to the rulings of his predecessor was unnecessary. The former judge did note and sign the rulings and exceptions, and they are in the record.

The judgment of the Circuit Court is affirmed with costs.

CALVIN L. ROBINSON, APPELLANT, VS. THEODORE HART-
RIDGE, APPELLEE.

1. Bill of exceptions must be made up and signed during the term, under the rules of practice in the Circuit Courts, in all cases except where, by special order, further time is allowed. Where the judge, in signing the bill of exceptions, certifies that the bill is made up and tendered for signature after the term, by his special leave and authority, it is presumed that special leave was granted during the term by an order of the court.

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2. An appellate court will not review any action of the inferior court, involving a consideration of the whole testimony, unless the whole of the evidence is before the reviewing court; but it is not necessary that a bill of exceptions should, in precise words, state that all of the testimony introduced is embodied in it. Where the bill purports to contain the evidence which "the plaintiff gave in his behalf," and the evidence "given in behalf of the defendant," reciting after this statement the evidence offered, it is sufficient.
3. Where it appears from the record that an objection was noted to interrogatories, to be propounded to a witness to be examined upon commission, and the record is entirely silent as to any disposition made of these objections by the court, and the bill contains the answers of the witness, the presumption is that the party making the objection abandoned it, and that the deposition was read.
4. Under the statutes of this State, a total variance between the writ and declaration is no ground after verdict for an arrest of judgment in the court below, nor for a reversal of the judgment in this court.
5. Under the rules of practice in the Circuit Courts, the plea of not guilty in trover does not put in issue the plaintiff's title to the goods. Under this plea, defendant cannot introduce evidence in denial of all property or right of possession in the plaintiff. None of the statutes of this State have changed this rule.
6. The act to amend the pleading and practice of this State adopts certain forms for particular pleas, and enacts that the forms set forth shall be sufficient. The effect of the statute is to render the brief forms sufficient for all the purposes for which the more lengthy forms were required before the act; but the effect and operation of the plea is not extended beyond its effect anterior to the statute.
7. The unauthorized sale of the property of another is a conversion; that the true owner is unknown; that the party making the sale believed that it was a consignment to him for sale, and that he retained the proceeds, subject to the order of the true owner, when discovered, is no justification for the unauthorized exercise of the acts of ownership involved in the sale, and does not cure the conversion.
8. If in such a case the act of sale is confirmed or consented to by the owner, and he afterwards objects to receiving the proceeds because the sale did not realize what he deemed the full value, he cannot recover in trover. If the sale was authorized and was fair, and there was no breach of duty, the form of action is assumpsit for the proceeds, and if there is a breach of duty in the act of sale, the form of action is a special action on the case.
9. When a party receives chattels from a carrier, under the belief that he has a general or special property in them, and ships them to a distant

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market in the name of a third party, but for his own benefit, such act is a conversion if he has no such general or special property and the act of shipment is unauthorized, or not ratified or agreed to by the true owner.

10. In trover, a demand and refusal establishes a conversion in no case where the defendant has not the possession of the property at the time of demand made.
11. The general rule, as to damages in trover, is the value at the time and place of conversion, with legal interest to the date of the verdict.
12. Defendant's counsel, misapprehending the effect of the plea of the general issue in trover, attempts to introduce, after the plaintiff has closed his testimony, evidence in denial of the plaintiff's title; it is objected to, and the objection is sustained; the defendant asks leave to file a special plea, putting the title in issue: *Held*, under the statutes of this State, that the application to cure the defect is duly made, and if the question of title is involved in the determination of the true questions in controversy between the parties anterior to the trial, it is such an amendment as is authorized by statute, and made the duty of the court to allow.

This is an appeal from a judgment rendered in the Circuit Court for Duval county in an action of trover, instituted by Hartridge against Robinson, to recover damages for the conversion of four bales of cotton.

The case is stated in the opinion of the court.

H. Bisbee, Jr., for Appellant.

J. P. Sanderson for Appellee.

WESTCOTT, J., delivered the opinion of the court.

There are several objections made to the bill of exceptions in this case. It is objected that the bill was filed after the term. The eighth rule of practice of the Circuit Courts requires that "bills of exception shall be made up and signed during the term of the court, unless, by special order, further time is allowed." It is stated in the record by the Judge, under his hand and seal, that the bill of exceptions in this case was made up and tendered for his signature after the term by his special leave and authority. That special leave

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could have been granted in no other way except by the order of the court during the term, and that such order was made, is the only conclusion consistent with this statement of the judge.

The bill having been made up after the term, as a matter of course, it could not be filed before the expiration of the term.

One of the errors assigned in this court is the refusal to grant a motion for new trial, to determine which involved a consideration of all of the evidence adduced upon the trial, and it is insisted that such action of the court cannot be reviewed here unless it appears that the bill of exceptions contains all of the evidence introduced, and that in this case it does not appear that all of the testimony introduced is contained in the bill, because it does not expressly state this fact:

Whenever this court is to review any action of the court below which involved a consideration of all of the testimony, it is plain that we cannot act intelligently unless all of the testimony is before us; and in this case, where we are called upon to review an order of the court refusing a new trial, which was requested upon the ground that the verdict was contrary to the evidence, we cannot review the action of the court in overruling the motion unless the entire evidence is before us.

While we agree with the appellee to this extent, we cannot coincide with the view that the bill must contain *an express statement* that it embodies all of the testimony. The usual rule in those courts where the refusal to grant a new trial is not a matter of exception, but is the exercise of a discretion which an appellate tribunal will not control, is that the bill should contain all of the testimony applicable to the precise question of law raised in reference to it, and no more. It is just as essential to have *all* of the testimony *applicable* to a point raised which involves a consideration of a part only of the testimony, as it is to have the entire tes-

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timony when the point raised involves a consideration of the whole, and yet none of the forms of a bill of exceptions given in the accepted works upon practice have an express statement that the bill contains *all* of the testimony upon the particular point. Arch. Forms, 122; Tidd's Ap., 206; Bull. N. P. 317; 2 Hen. Black., 288; 3 Burr, 1746, 1692. They contain a simple statement that the party, "to maintain and prove the issue on his part, gave in evidence that," &c., or something to the like effect. In this case the bill purports to contain the evidence which "the plaintiff gave in in his behalf," as well as the evidence given "in behalf of the defendant," and that is deemed sufficient.

We cannot presume that the judge would sign a bill which, in contemplation of law, purports to contain the evidence, used at the trial, when the contrary is the fact. The precise question was raised in *Jordan, administrator, vs. Adams*, 2 Eng., 348, where the court remarks: "It is not necessary that the bill should avouch in exact words that this was all of the testimony in the case." It is sufficient if it appear from the language that the whole evidence is given.

We have examined with care the citation of appellee to this point, and find but one which is in conflict with this view. In this case (5 Mo., 112,) the head note states the rule correctly, while in the body of the opinion the court remarks that, for want of the fact being stated in the bill of exceptions that all the evidence given is in the bill, it will not examine the motion for new trial. This case was of small importance, being an appeal from a justice's court. The precise question was not argued by counsel. It does not appear to have received accurate consideration by the court. The precise form of the bill is not disclosed in the case as reported. It is in conflict with well considered decisions, as well as with the practice in the English courts.

The next objection arises thus: The plaintiff in this cause

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obtained a commission for the examination of W. H. Brodie, one of his witnesses, residing beyond the State. Upon crossing the direct interrogatories, defendant objected to certain of them upon the ground of irrelevancy, reserving the objection in the usual way.

Following the commission and interrogatories came the answers of the witness to the interrogatories. It is insisted that there is nothing in the record to show whether these objections were sustained or overruled; that it is, therefore, in doubt whether this entire deposition was read at the trial, and that when such a doubt exists, this court will not review matters involving a consideration of all of the testimony.

The case of *Proctor vs. Hart*, 5 Fla., 470, is cited to this point, and the statement of the justice delivering the opinion in that case is to that effect. An examination of that case will show that before making this statement, the court had decided the case upon the express ground that there was no bill of exceptions in the record. Having decided that there was no bill, the opening of what purported to be a bill and this statement was entirely unnecessary to the decision of the case.

Independent of this, the remark is one we cannot sanction. Where an objection is stated, and it does not appear that it was insisted upon by the party urging it, or that the court decided the point raised by it, the presumption is that it was abandoned. It is the business of the party making the objection to call it up for decision at the proper time, and if he neglects so to do, the other party is not to be prejudiced by such neglect. It is certainly no part of his duty to see that an objection made by his adversary is passed upon, nor is it the duty of the court, nor is it the practice for the court to call up such matters. The failure to act by the party making the objection is an abandonment of it, and when, as in this case, such an objection appears undetermined, and at the same time the answers of the witness to all of the interrogatories are in a bill of exceptions, which purport to con-

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tain what was read in evidence, the presumption is that they were read. In cases where the appellee has made such objections and abandoned them, the result would follow that the appellant, for no fault of his, (for it does not devolve upon him to call up for consideration his adversary's objections,) would be denied the right of having reviewed in this court the orders of the inferior court involving a consideration of the entire testimony. Where from the bill it appears that a witness is being examined, or it is proposed to put a paper in evidence and an objection is made, but it does not appear that it was urged, and the answer of the witness or the paper is set out in the bill, the presumption is that it went to the jury. Any other conclusion is inconsistent with the fact that the answer is in the bill, and discredits the act of the judge in signing the bill. A simple objection amounts to nothing in this court. A ruling must be had upon the point raised by it, and an exception must be noted to such ruling. 4 Wall., 602. In some States the objection will not be considered by the appellate tribunal, unless the ground upon which it is made is distinctly stated in the bill. We do not think that such a remark would have been made had the able justice delivering the opinion in the case referred to given it a moment's consideration, and we regard it as a casual remark, induced by the confused state of the record in the case then being considered.

A further and the last objection urged to the bill is, that "it appears that the judge has only signed three of the exceptions" taken during the trial. The judge's signature and seal purports to be attached to the "foregoing bill of exceptions," and looking to the record, we find a bill commencing with the issue purporting to contain all the evidence, as well as the three exceptions alluded to.

Having disposed of these objections, we reach the errors assigned in this case. The first is, that the court erred in giving judgment upon the verdict of the jury, the declara-

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tion being in trover and the writ in assumpsit, and that the declaration is defective for want of material allegations.

The defendant in the court below, without making any objection to this total variance between the writ and declaration, pleads to the changed form of action, goes to trial, and this objection is made for the first time in this court. The objection comes too late. Under strict rules of pleading, independent of the statute of this State, the judgment would have been arrested upon this ground, (3 Black, 393; Gould's Pl., 461;) but under the first and second sections of the act of 1861, entitled an act to amend the pleading and practice in the courts of this State, it is not necessary to mention any form of action in the summons, and if one form is substituted for another, it is no objection to any proceeding in the action, and the writ may be amended upon an *ex parte* application without costs. Under the provisions of the act of November 23, 1828, (Thomp. Dig., 351,) "after verdict, the judgment cannot be stayed or reversed" for this variance. It is thus seen that this variance amounts to but little when urged in the Circuit Court before verdict, and amounts to nothing when urged after verdict, and that it is no ground for a reversal of the judgment by this court.

The other objection embraced in this assignment is, that the declaration is defective for want of material allegations. The declaration is sufficiently certain in the description of the property, in the statement of the value, and in all respects it is much more definite and particular than the form prescribed by the act regulating the practice and pleading in this State.

The second error assigned is, that "the court erred in rejecting evidence of title to the property in question in a stranger, the court holding that a special plea of title in a stranger was essential to admit said evidence." The only plea filed here was the plea of not guilty, and under this plea the evidence stated above was proposed to be introduced.

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Under the rules governing the practice of the Circuit Courts, the plea of not guilty in actions on the case operates as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defence than such denial shall be admitted under that plea. All other pleas in denial shall take issue on some particular matter of fact alleged in the declaration. As an illustration of the operation of this rule, it is stated that "in an action for converting the plaintiff's goods, the plea will operate as a denial of the conversion only, and not of the plaintiff's title to the goods." In this case the evidence proposed to be introduced was in denial of any property or right of possession in the plaintiff, and to prove the sole property or right of possession in some one other than the plaintiff. This rule is a copy of the rule adopted in England at Hilary term of 4 William 4, controlling and fixing the operation and effect of the plea of not guilty (the general issue) in actions of this character. The rule has repeatedly received construction in the English courts, and their decisions are that the defendant cannot, under the plea of not guilty in trover, avail himself of the defence which the defendant sought to make available in this case. In 2 Meeson & Welsby, 8, the court of exchequer held that in trover, under the new rules, the plaintiff is entitled to a verdict on the plea of not guilty, if on the trial a conversion in fact be proved, although it appear from the evidence that at the time of such conversion the plaintiff had parted with his property in the goods. In 5 Meeson & Welsby, 296, the court held that under the plea of not guilty in trover the defendant could not set up an absolute property in himself in the chattel by sale from the plaintiff, although the evidence of a conversion was a demand and refusal. See also 2 Crompton, Meeson & Roscoe, 1; 6 Exchequer, 257; 6 Eng. Law and Eq., 566.

It is, however, insisted that the 22d, 23d, 30th, 31st and 38th sections of the act to amend the pleading and prac-

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tice in this State, which was passed subsequent to the adoption of the rules, changes this rule, and that the title to the goods is put in issue under the plea of not guilty by virtue of the provisions of this act. This question is raised, and we propose to examine it very briefly. Indeed, upon the very face of most of the sections, their entire inapplicability is patent.

Section 22 provides that express color shall be no longer necessary in any pleading. What this has to do with the effect of the plea of the general issue in trover is not perceived, nor do we see any, even the most remote application to anything in this case. There was no objection on the part of the plaintiff to the plea of the general issue in this case because it did not give express color; such an objection would have been absurd. It would be a new idea that in the plea of the general issue, either express or implied color has any place. One is applicable to a special plea in trespass, by which, as a question of law, the defendant's title is referred to the court; the other is an incident of all pleas in confession and avoidance, and neither express nor implied color appertains in any case to a plea of the general issue, which is in legal effect a negation of all that is material in the declaration, except in cases where its effect is restricted by the rules of court, as for instance the plea of the general issue, where the form of action is in case for trover.

Section 23 provides that special traverses shall not be necessary in any pleading. It was insisted that this section abolished special pleas, and hence the defence was available under the general issue. A special traverse is but one form of a special plea, and the abolition of that form does not abolish other special pleas which are not special traverses. The court below did not require the defendant to plead in the form of a special traverse, nor did it determine that a special traverse was necessary in any pleading. Hence there is nothing in the action of the court to which this section re-

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fers, and it certainly has nothing to do with the question in connection with which it has been called to our attention.

We simply remark, with respect to section 30, that the defendant in this case has not been denied the right of traversing generally such facts in the declaration as he might have denied by one plea, nor do we see that he has been denied the privilege of selecting and traversing separately any material allegation in the declaration, although it might have been included in a general traverse. These are the rights which this section gives. They have not been denied in this case. Indeed, the section has not the most remote reference to anything in it.

Section 31 regulates traverses of the pleadings of the *defendant* by the *plaintiff*. In this case the plaintiff simply added the similiter to the defendant's plea of the general issue. The similiter is in no sense a traverse, and hence it is not perceived how this section of the act has any reference to the case, and certainly no connection with the point which it was read to sustain.

Section 38 is as follows: "That the forms contained in the schedule to this act annexed shall be sufficient, and those and the like forms may be used with such modifications as may be necessary to meet the facts of the case; but nothing herein contained shall render it erroneous or irregular to depart from the letter of such forms so long as the substance is expressed without prolixity."

One of the forms of pleas for wrongs, independent of contract, contained in the schedule is the general issue, and the other three forms are of pleas by way of confession and avoidance—the first being a plea of "leave and license," the second of "self-defence," and the third of a "right of way." It is insisted that by virtue of this section, and of the fact that a form of the plea of the general issue appears in the schedule, that the plea of the general issue is sufficient to let in the defence of a want of title in the plaintiff to the goods involved in this action. The effect of the section is

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to render the form there prescribed, which is brief and simple, sufficient without resort to the lengthy form in which this plea must have been if framed according to the forms prescribed anterior to the act. It could as well be contended that under the plea of "leave and license," which is one of the forms declared "sufficient," a defendant could deny the act committed, which his plea confesses but proposes to avoid, (which is absurd,) as to contend that under the plea of the general issue in this cause the plaintiff's title or right to possession of the goods could be denied. The brief forms of pleas adopted are sufficient for all the purposes for which the more lengthy and verbose forms were required anterior to the act, but the effect and operation of the plea is not extended beyond its effect anterior to the statute.

The fourth error assigned is that the Circuit Court erred in denying the motion of defendant for a new trial. We deem it necessary to review but two of the grounds upon which this motion was urged in the court below :

First—That the verdict was contrary to the law.

Second—That if acts of ownership amounting to a conversion were proved, they were assented to and ratified by plaintiff.

It will be seen that the second ground is but a repetition of the first, for if these acts were ratified, then the law could not have justified a verdict finding the defendant guilty of a conversion.

For the sake of order and sequence, we thus distribute the grounds of the motion.

The appellant in this court has argued elaborately that there is in law no conversion under the evidence, and as there is no conflict in the evidence as to the circumstances under which defendant received the cotton and his subsequent exercise of control over it, we proceed to state, for the guidance of the court below, the conclusions of law upon the subject of conversion, which follow from the facts clearly established in this case. As a matter of course, what is here stated is

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upon the pleadings as they now stand, and it must not be inferred from what is said that we express any opinion as to the evidence upon the question of the identity of the cotton or the property of the plaintiff in the cotton, or whether the sale was subsequently ratified. As the case now stands, we can only regard it in such light as admits the general property in the cotton in the plaintiff. Such is the clear admission of the plea under the rules governing in this action, according to the unvarying decisions of the English courts.

Hartridge, the plaintiff, bought during the war twelve bales of cotton from Griffin, of Lake City. He purchased by sample, never having seen the cotton. Eight bales of the cotton were shipped to Hartridge at Jacksonville, after the war, in the year 1865. This he received, and upon its shipment in lots of four bales to New York, one lot was sold by his factor, Brodie, at one dollar and eighty cents per pound, and the other at one dollar and fifty-five cents per pound. Griffin testifies that during the winter of 1865, the remaining four bales were shipped to Hartridge at Jacksonville. He did not receive them. Robinson, who was then receiving consignments of cotton at Jacksonville, stated in a conversation with Hartridge, had some time afterwards, that he had received four bales of cotton of which he had no advices, and as the cotton had been shipped to New York, he agreed to pay Hartridge for it when he received the account sales. Sometime after this, Robinson made Hartridge a payment of one hundred dollars on account of the cotton. Upon receipt of the account sales of the cotton shipped by Robinson, the price realized was nearly three times less than the other lots were sold for by Brodie, and Hartridge refused to accept the amount realized, and brought this action. The cotton, it appears, came to the depot at Jacksonville at a time when the defendant was receiving freight of like character. The persons in charge of the depot were doing business in a loose manner, permitting the draymen to take such cotton as they thought belonged to the persons for whom

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they had been in the habit of carting goods. The drayman who usually carted for the defendant removed from the depot the four bales of cotton, and the defendant, who was then receiving consignments of cotton, supposing that this cotton was assigned to him, although he had no advice as to it, sent it to a vessel which was then loading for New York, and it was stored for shipment to defendant's agents and factors. The defendant admits that he was aware before the vessel sailed that he had shipped to New York these four bales of which he had no advices, and in addition states that efforts were made to get the cotton out, but the hatches were down and the vessel ready for sailing, and the master was not willing to disturb the cargo. The goods were shipped to New York, and were sold by the agents and factors of defendant.

There is and can be no doubt that the unauthorized sale of this property in New York by the authorized agent of the defendant was an act inconsistent with the general right of dominion and control of the owner of the property. The act of selling the property of another without his authority is an assumption of a right of the highest and most unequivocal character. A person selling property acts at his peril. If he assumes such authority over the property of another without the owner's consent, that he does not know the true owner will not avail him, nor will the actual retention of the proceeds for the true owner avail him as a defence. This cannot justify the assumption of dominion over the property, or avoid or excuse the conversion, which is the result of the act of sale. The owner cannot be obliged to receive the proceeds of an unauthorized sale of his property. If he deems the sale fair and for full value, he can accept it, but this is at his discretion. Says the court, in *Gibbs vs. Chase*, 10 Mass., 131: "He who interferes with my goods, and without any delivery by me, and without my consent undertakes to dispose of them as having the property general or special, does it at his peril to answer me the value in trover."

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It may be stated as a rule, that when it is admitted or proved that the defendant, without authority, has sold the goods and received the money therefor, no further evidence of conversion is necessary. 3 Rob. Pr., 463; 6 Wend., 207; 1 Leigh, 86; Strob. Eq., 375; 5 Cowen, 326; 7 ib., 738; 23 Wend., 468; 18 Ala., 719; 40 Barb., 406; 1 Kelly, 391.

In this case a demand of some kind appears to have been made upon the defendant, but it was, under the circumstances, both unnecessary and unavailing. No demand is necessary to establish a conversion where a conversion is otherwise proved, nor is a demand effective if the failure to comply is explained by a want of possession, (8 Meeson & Welsby, 366; 3 Stark. Ev., 1497; Bull. N. P., 44; 1 Camp., 446; 2 Salk., 441; 1 Cush., 552,) as it was under the circumstances of this case, there having been a previous shipment and sale. The court, in 1 Cushing, 552, remarks: "No demand is necessary if the conversion is proved *aliunde*," and in illustrating this view, says: "So if a man finds property, he may lawfully take it *and take care of it*, but if he afterwards sells it without authority, that *ipso facto* will be a conversion."

A finding of property, or a possession acquired in any lawful manner, does not justify acts inconsistent with and in violation of the rights of the true owner, though he may be unknown; and in case of a sale, the retention of the proceeds, subject to the owner's control when discovered, will not justify the conversion. It is necessary in this case to determine and to state the time and place of conversion, for the rule as to damages in trover, under the circumstances disclosed in this case, is the value at the time and place of conversion, with legal interest to the date of the verdict. It is thus seen that it is necessary to determine the legal effect of the act of shipping the cotton beyond the State under the circumstances disclosed in this case, for if that act be a conversion, then the value must be the value at Jacksonville, and the time of the estimate and the date from which the

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interest must be calculated must be the date of the shipment. Neither a naked possession nor every asportation accompanied with a recognition of the title of the true owner, and which is not to interfere with the dominion of the true owner over the chattel, constitutes a conversion; but "any asportation of a chattel for the use of the defendant or a third person amounts to a conversion, for the simple reason that it is an act inconsistent with the general right of dominion which the owner of a chattel has in it, who is entitled to the use of it at all times and in all places." 8 Meeson & Welsby, 547. In this case, the sending the cotton to the vessel and authorizing its being placed in the hold, was made with the impression that it was a consignment. Before the vessel sailed the defendant, receiving no advices as to it, made efforts to get the cotton out of the vessel but the hatches were down and the ship was about ready to sail. The agent of the defendant, however, states in his testimony that he did not make much of an effort to get the cotton, as he believed it belonged to defendant.

That the defendant was doing a business in which it was his duty to ship cotton to New York for other parties, and that this cotton was shipped under the impression and belief that the act of shipment beyond the State and to a distant market was simply doing what the defendant thought would be the desire of the owner, cannot justify the act of shipping the cotton on his own account. The sale in this case was an assumption of general ownership and property; the shipment was the assumption of a particular power to place it in possession of the carrier for removal to a distant market, and though the bill of lading was taken in the name of a third party, it was in fact for the benefit and account of the defendant, and it was a shipment on his own account. It is not enough that such acts as these are done under the *belief* that the party doing them is the agent and factor of the true owner, and is invested with the special power and authority incident to such relations, and that it was the pur-

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pose of the party to retain the proceeds of sale for the benefit of the true owner when discovered. Such act must be *authorized* by the owner, and if it is not, it is a conversion. It is an assumption of authority and power inconsistent with the right of the owner. The owner had a right to retain his cotton at Jacksonville, to ship it to Liverpool, or to make any other disposition of it that he saw proper. Directing its shipment, its actual shipment upon his own account, beyond the State, destined for a particular market for sale, is an assumption of dominion over it, and being *unauthorized* by the rightful owner, constitute a conversion.

In the case of John Boyce and others vs. Jesse Brockway, (31 New York, 492,) the defendant had received at Cattskill and shipped to New York a number of firkins of butter, which were sold on his account. Plaintiffs instituted an action of trover against him. The butter had been purchased by a party who was making purchases as the agent of the plaintiffs as well as of defendants. It was delivered to defendant with other goods which had been purchased for him. He shipped it. Evidence was given on the part of the plaintiffs tending to show that when the butter was delivered to defendant at Cattskill, he was informed that some of the butter belonged to plaintiffs, but defendant testifies that he was wholly ignorant that any butter but his own was delivered to him. The court, in commenting upon this evidence, say: "The defendant gave evidence tending to show that he received the butter in question in good faith, supposing it to be his own, and without any knowledge that it belonged to plaintiffs. He requested the court to charge that 'in that case if he took the same care of it as his own, and it was lost without his fault, this action was not sustained.' The charge as requested would have been proper if the defendant had under such circumstances *simply received the butter and stored it in his warehouse*. Such an act would not have been the exercise of such dominion over it as would amount to a conversion without proof of a demand and refu-

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sal. There would be no sufficient assumption of ownership by a mistaken acceptance of the property so delivered, to render him chargeable for any relation beyond that of bailee, but quite a different question arose when he shipped the butter to New York as his own. That was an assumption of dominion, which, whether founded in mistake or not, was in hostility to the ownership of plaintiffs." 1 Hill on Torts, 76 and 77; 1 Wils., 328; 6 Wend., 603; 4 Denio, 323; 1 Kelly, 391; 3 Ark., 133; 9 Barb., 242; 49 Maine, 213; 41 Penn. State, 291; 18 C. B., 403; 34 Vt., 330; 36 N. H., 311; 14 Wis., 5.

It was urged in this case that the verdict was contrary to the evidence and law, the defendant insisting that even if acts inconsistent with the right of the owner were proved, that it was apparent from the evidence that the acts of ownership exercised by the defendant over this property, viz: the shipment to New York and sale, were approved by the plaintiff, that the plaintiff did not object to the shipment when advised of it, nor did he object to the *act of sale*, but that on the contrary, after being advised by defendant that he had shipped four bales of cotton that he had no advices of, which was perhaps his (the plaintiff's,) and that it was perhaps sold, it was agreed between the parties that defendant would pay for it when he got the account sales, that when the account sales was received, plaintiff declined to accept payment according to the account sales, on account of the small price for which it sold, and that defendant on account of the small price, concluded that the cotton he shipped could not have belonged to plaintiff. We deem it necessary to notice this, as it involves interesting questions as to the form of action in the several aspects in which the facts may be viewed, which facts we leave to the jury.

If the plaintiff in this case assented to, affirmed, agreed to, or ratified the *act of sale* before the account sales was received, and his objections arose from the *results of the sale*, to wit: the smallness of price received, then there is no con-

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version, and trover is not the appropriate form of action. 16 John., 74; 27 Ala., 229; 12 John., 300. If the act of sale was ratified or assented to, then if there was no breach of duty or fraud in the manner in which the act of sale was performed, the form of action is assumpsit. If there was a breach of duty or fraud in the act of sale, the remedy for the damage consequent upon the breach of duty, is a special action on the case. 3 Taunt., 11; 12 John., 300; 13 Ind., 41; 16 John., 76; 12 Pick., 139. As to what is the true state of facts, we must leave for the jury to determine under proper instructions, and as there is to be a new trial upon other grounds, the parties will have full opportunity of showing the true state of the case.

The third error assigned is that the court erred in refusing leave to defendant to file a plea denying plaintiff's title to the goods. Leave to file this plea was not requested until after the trial had commenced, and after the plaintiff had closed his testimony. The defendant's counsel, misapprehending the effect of his plea of the general issue, attempted to introduce evidence in denial of plaintiff's title, which was objected to as inadmissible, and the court very properly so held; whereupon leave to file a plea of the character stated was requested and denied. The decision of this question involves a construction of the seventy-fourth section of the act to amend the pleading and practice in the courts of this State. This section is as follows: "That it shall be the duty of the courts of this State, and of every judge thereof, at all times to amend all defects and errors in any proceeding in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments shall be made with or without costs, and upon such terms as the court or judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties, shall be so made if duly applied for."

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The first question which arises is, whether the filing an additional plea of this character, raising an entirely new issue and enlarging the defence, is an amendment or a proper means of correcting an error or defect within the meaning of this section.

The second question which arises is, was it the duty of the court to have permitted it at this stage of the proceedings under the circumstances of this case.

We have no doubt that the filing of a plea is authorized by the section, in the event it is necessary to determine the true question in controversy between the parties anterior to the trial. This section is almost a copy of the 94th section of the Common Law Procedure act of 1854, (17 and 18 Vict. Ch., 125,) regulating the pleading and practice in the English courts, and we find little difficulty in giving it construction.

In *Cornish vs. Abingdon*, (1 F. & F., 562,) which was an action for money had and received, a count in trover was allowed to be added at the trial. In *Taylor vs. Shaw*, 1 C. & R., 1,057, it was decided that "a judge at *nisi prius* may in his discretion allow a count or plea to be added."

These decisions were made under the Common Law Procedure act of 1852, but they are entirely applicable to the corresponding section of the act of 1854, when the question is of the same character with the one now being considered. The filing of such a plea should therefore be permitted if it is necessary to determine the true question involved in the controversy between the parties. From the evidence in this case, among the questions in controversy between the parties, is the question of title to the goods. The plaintiff himself went into evidence to prove title, a large portion of his proof being applicable to that subject. The defendant in his testimony states that upon receiving the account sales, he said to plaintiff that the cotton was sold, and that it was so poor he must conclude that it was not his, (plaintiff's,) cotton. In addition to this, the very great difference in the price re-

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alized for the four bales of cotton, sold by defendant's agents in New York, and the cotton sold by Brodie, the agent of Hartridge, which plaintiff claims was of the same quality and lot with the cotton received by the defendant, makes it a question whether the cotton received by the defendant belonged to the plaintiff. If the jury believe that the sale by defendant's agents was in all respects fair and for full value, or if indeed they believe the testimony of the agents and the witnesses examined in reference to the sale, they certainly cannot believe that the cotton sold by Lyles & Polhamus, (defendant's agents,) was a portion of a lot some of which sold about the same time for nearly three times as much. In order to reach a conclusion favorable to the defendant upon this testimony, they necessarily decide that the cotton received and sold by defendant's agents was not, and could not have been a portion of the identical lot sold by Griffin, and in coming to this conclusion they necessarily decide plaintiff has no title, as he claims no other than four of the twelve bags which he purchased of Griffin.

We think it appears from the testimony that the question of title was one in controversy between the parties, and that a fair trial disposing of all the questions requires that this question should be submitted to the jury: Was the application duly made? The statute makes it the duty of the courts *at all times* to allow such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties, if duly applied for. As shown, the English courts have gone so far as to insert at the trial a count in trover, where the declaration was in assumpsit for money had and received. This is a blending in the same case of forms of action arising from contract with those arising from wrongs independent of contract. They have also permitted a plea to be added at the trial. It is insisted that the plaintiff had closed his testimony and it was too late, that such an application was not a due application within the meaning of the statute.

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It would be a very unjust rule which would permit the plaintiff to amend his declaration by adding new counts after he had commenced the introduction of his testimony, and permit him to so amend his pleading as to combine actions *ex delicto* with those *ex contractu* whenever necessary to determine the true questions in controversy, and at the same time to deny to the defendant the privilege of amending his pleas after he had commenced an examination of his witnesses, simply because the plaintiff had closed his testimony. In this case the court should have permitted the filing of the plea, the jury should have been discharged from the consideration of the case, (as they were not sworn to try the new issue,) the plaintiff given such time as was proper under the statute to reply to the amended pleading of the defendant, and when the issues were made up, the case should have again been submitted to a jury. If the plaintiff had desired a continuance, we think the court should have granted it, because under the pleadings the question of title was not in issue, and he was not expected to be prepared with any proof upon that subject. This course would have enabled the parties to try the true question in controversy, would have prevented any surprise of the plaintiff, and would have left no reasonable ground of complaint for either party. In this case, we control the action of the court below in the matter of amending the pleadings under and by virtue of the provisions of the act of January 7, 1853, which makes any order refusing to allow a motion to amend the pleadings the subject of review in this court. In the English courts the contrary practice prevails.

The judgment is reversed. The case is remanded to the court below, where the defendant will be permitted to amend the pleadings upon such terms as to costs as the court may direct, and for further proceedings not inconsistent with this opinion.

Watts vs. Hendry—Argument of Counsel.

JOSEPH B. WATTS, APPELLANT, VS. NEAL HENDRY, APPELLEE.

1. A. sold to B. one hundred cattle of named age and part of a particular stock then running upon the range. B. paid the price agreed upon, and A. gave to him a delivery order upon his (A.'s) agent. C., with a knowledge of these facts, subsequently purchased of A. the balance of the particular stock. He (C.) took possession of the entire stock, and admitted to B. his right of property in and possession to the one hundred cattle: *Held*, That C., upon setting up a claim of exclusive ownership to the one hundred cattle, and upon denial of the right of B., was liable in trover to B.

This is an action of trover brought by the appellant against the appellee in the Circuit Court for Madison county. There was a judgment for the defendant upon the merits, from which this appeal is prosecuted.

The case is stated in the opinion of the court.

Baker, Call and Whitner for Appellant.

It is a rule in law that the general property in personal chattels creates a constructive possession, so that the owner may bring trover or trespass. 1 Chitty's Pl., 152; 7 Cowen, 329; 2 Saund., 873.

When the sale is completed, the vendor is only bound to deliver the subject matter upon tender of payment; if he refuse to do so, the vendee may take the goods in trover. Story on Sales, 388.

When the goods are such as to render manual delivery difficult or impracticable, or inconvenient, in such case any formal act is sufficient which places the goods in the actual power of the purchaser, or which impliedly asserts that they are his property. Thus the transfer of the keys of a warehouse where the goods are stored, or a receipt ticket, sale note, bill of lading, or any type of title. 5 N. H., 371; 1 Hill. on Torts, 530; Story on Sales, sec. 311, 392.

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The law only requires such delivery as is consistent with the nature of the thing sold. Story on Sales, sec. 312.

When goods are sold and not separated from the mass or bulk, it is a question whether the sale is sufficiently complete to authorize the action of trover. The rule seems to be that when everything is done that is necessary to ascertain the quantity and price, the sale is complete. 2 Saund., 873; 1 Chitty's Pl., 150-2.

It has been held that a sale of cotton and hides in bales is not complete until they are weighed.

According to custom, their price and quantity are ascertained by weight and not by number.

On the contrary, it is held that a sale of flour by the barrel or corn by the bushel, and an order for their delivery, is a complete sale, and vests such right of possession in the vendee as to enable him to maintain trover. 39 Penn., 521; 3 Strob., 384; 1 Hill. on Torts, 53; 2 Iowa, 591.

In this case the quantity, quality and price even clearly ascertained, payment received, an order in writing given, nothing further remained to be done by the vendor, purchaser had a perfect right to take possession at any time. The vendor had no further legal lien on the goods. 11 East, 211; 4 Com. Law, 300.

Goods coming into possession of defendant, claimed by plaintiff, and defendant keeps them and offers to pay for them, trover will lie for recovery, as defendant thereby admits plaintiff's property in the goods and cannot afterwards deny it. 1 Miss., 71.

Sale of chattel without actual delivery gives vendee a constructive possession sufficient to maintain trespass or trover. 1 Hill., 528.

A purchaser of chattels at a sale by auction may, upon offering to comply with terms of sale, and a refusal by vendor to make delivery, maintain trover therefor. Also, when a wharfinger had promised to deliver goods upon an order

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shown him before they arrived, held that plaintiff might maintain trover after their arrival. 1 Hill., 530.

These authorities, when applied to the evidence, show clearly that the property vested in the plaintiff at the time of sale by construction of law. If not, when did it vest? When Grenad sold remainder of stock? Certainly not in the Hendrys, for they bought the remainder of stock with full notice of the purchase of Watts, and after their purchase, admitted his title to the steers in writing.

The second part of the charge given by the court to the jury leaves no discretion to the jury, but assumes to settle the facts as well as the law by directing the jury that a "demand was necessary before the commencement of the suit."

The testimony shows that the defendant converted the property to his own use.

When a conversion is shown, a demand and refusal is not necessary. 10 Johns., 172; 5 Cowen, 323; 3 Wend., 406; 23 ib., 462.

Demand and refusal is only evidence of conversion, and is not necessary when conversion is proved by other testimony. 8 Com. Law R., 214.

A simple possession, with a claim of title adverse to that of the true owner, is held sufficient evidence of conversion. 2 Hill. on Torts, 98; 8 Ga., 61.

It is not necessary to show that the defendant applied the property to his own use. The assuming the right to dispose of it, or exercise dominion over it exclusive of owner's right, is a conversion. 10 Johns., 172; 7 ib., 254; 1 Chitty's Pl., 155.

In this case defendant claimed an adverse title to cattle in dispute. He assumed to exercise dominion over them to the exclusion of plaintiff's right.

J. J. Finley for Appellee.

It is contended for the defendant in error that the plaintiff in trover must, at the time of the alleged conversion, have

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had a *complete* property, either *general* or *special*, in the cattle, and also the actual possession or the right to immediate possession. 2 Stephens, N. P., marg., 2667, 2660; 2 T. R., 750; 4 Bing. R., 106; 2 Saund., 47, note 1; 31 Ill., 120; 4 B. & C., 941; 1 Chitty's Pl., 148; 2 Iowa, 580; 48 Barb., (S. C.,) 581.

It is contended for the defendant in error that at the time of the alleged conversion, the plaintiff did not have a *complete* property, either general or special, in the one hundred head of steers, and that he had neither the actual possession nor the right to the immediate possession at that time.

That the plaintiff never had the actual possession, is so conclusively established by the proof that it does not admit of argument.

It is contended that the delivery of goods is necessary to vest the right of property in the vendee. 1 Story on Con., sec. 503; 2 Cr. C. C., 284.

And the first rule of law applicable to delivery, *and to which all others are subordinate*, is that no sale is complete, so as to vest an immediate right of property in the buyer, so long as anything remains to be done as between the buyer and seller. 2 Chitty on Con., sec. 800; 19 Barb., 416; 1 Par. on Con., 441, sec. 464, 3 ed.

And in order to delivery, the goods must be *identified*, *separated* and *distinguished* from all other goods, and from the bulk and mass with which they are mixed. 2 Story on Con., sec. 800; 8 Fla., 40-1; 1 Wheat., 471; 4 Taunt., 644; 5 ib., 176; 7 Cow., 85; 7 Ohio, 128; 20 Pick., 280.

If chattels are sold by *number*, *weight* or *measure*, the sale is incomplete, and the risk continues with the seller until the *specific* property be *separated* and identified. 2 Kent's Com., 496; 2 Story on Con., sec. 801; 4 Scam., 327; 28 Vt., 709.

And so if a man buy a quantity out of a larger bulk, (or some out of a larger number,) he does not buy it until it is separated from the rest. And there must be an acceptance

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after the separation. He must have the opportunity of refusing what the vendor may have selected. 2 Parsons on Con., 327, note, (3 ed.); 20 Eng. Law and Eq., 524.

As to what constitutes *actual* and *constructive* delivery, see 2 Story on Con., sec. 801, 810.

To support trover, the plaintiff must have the right to some *identical* or *specific* goods. 3 Stephens, N. P. 2661, 2665; 17 Serg. & R., 285; 5 B. & A., 654.

In a sale of goods there must be a *specific* right to some *particular* goods, *severed* and *distinguished* from others, and if there remain to be done in the contract some act to ascertain the quantity or price, the vendee cannot maintain trover until the act is done. 3 Stephens, N. P. 2677; 1 Chitty's Pl., 150; 15 Johns., 349.

Under the law applied to the facts in this case, it is confidently contended that the plaintiff has never been vested with a complete property, either general or special, in the cattle in dispute, and that without such property it is legally impossible that he could have the right to the immediate possession.

If the above conclusion be true, then the plaintiff cannot bring trover in this case against the defendant, but his remedy would be against Grenad, who alone was bound to deliver him the cattle.

Even if there had been delivery of the one hundred steers by Grenad to the plaintiff, the proof in the record establishes the fact that they have always been and still are running at large upon the range, and have never been in the actual possession of the defendant.

Even if it should be considered that the defendant was in possession of the cattle in dispute, and that he knew of the sale to the plaintiff, and had agreed with the plaintiff to gather them and separate them from the herd and deliver them to the plaintiff, he would in law, and upon this state of facts, have been a *bailee* of the plaintiff, and a demand

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and distinct refusal would have been necessary before trover could be maintained.

Even a refusal to deliver goods on demand will not necessarily constitute a conversion, unless the party refusing have it in his power to deliver up the goods detained, and the refusal be distinctly made. 3 Stephens, N. P. 2689.

If the defendant can, upon any possible conclusion upon the facts in this case, be held liable as a *bailee*, then, as already said, a previous demand and refusal are necessary to maintain the action, because in such case the defendant would have been lawfully possessed in the first instance. 3 Stephens, N. P. 2685.

In general, some tortuous act is necessary to a conversion, and it is not sufficient to prove a mere non-feasance. 3 Stephens, N. P. 2709, 2683; 1 B. & P., 438.

Can it be possible in view of the facts presented in the record, that the defendant has never contracted to deliver the cattle to the plaintiff which he purchased from Grenad, and that the plaintiff has always neglected to gather and separate them from the herd, although urged to do so by the defendant, and that the cattle are still remaining at large upon the range, with a sufficient number of the right age still remaining to fill the contract of Grenad with the plaintiff, and that the plaintiff did not demand the cattle of the defendant before he commenced his suit? I ask, can it be possible, under this state of facts, that any court of justice can or will hold the defendant responsible for not laying aside his own business, and, at great expense of time and money, gathering and separating the cattle claimed by the plaintiff, and driving them a great distance and delivering them to him, in order to execute a contract not made by the defendant with the plaintiff, but by Grenad, a third party?

To my mind, the proposition is altogether contrary to every sound and correct conception of justice.

It is therefore contended, upon the authorities cited, and upon the facts presented by the record in this case:

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1. That at the time of the alleged conversion, the plaintiff did not have that complete property, either general or special, in the cattle in dispute as would enable him to maintain trover against the defendant.

2. That having neither a general nor special property in the cattle, he could not have the right to the immediate possession.

3. That the defendant has never been in the actual possession of the cattle, they still running at large upon the range, and as much within the power of the plaintiff as the defendant.

4. That, under all the circumstances, the defendant is not and cannot be guilty of a wrongful conversion.

5. That even if the facts warranted the conclusion that the defendant was in possession of the cattle, and had, with the consent of the vendor, and with the knowledge and consent of the plaintiff to deliver the cattle to the latter, and had thus become the *bailee* of the plaintiff, trover would not lie against the defendant without a demand and refusal.

6. That upon the whole of the law and the facts in the case, the charge of the judge below and the verdict of the jury were right, and the judgment of the court below should not be disturbed.

WESTCOTT, J., delivered the opinion of the court.

This was an action of trover brought by appellant in the Circuit Court for Madison county. The facts are as follows:

Benjamin O. Grenad sold to appellant, (plaintiff in the court below,) Watts, in July, 1862, one hundred two-year old steers for one thousand dollars, which sum was paid by plaintiff. The cattle sold were a part of the "Lester stock," which stock numbered about four thousand. The cattle were running at large in the range, and the vendor (Grenad) addressed the following delivery order to one of his stock minders:

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"MR. VAUGHN—SIR :—I have sold Joseph B. Watts one hundred two-year old steers last spring, and you will see them gathered and delivered, and he has paid me the amount for the same, \$1,000, this the 22d July, 1862.

"Witness, J. M. HENDRY. "BENJ. O. GRENAD."

Upon the next day the vendor (Grenad) addressed a similar order to Vaughn. The one hundred head of cattle were never separated from the herd of four thousand, and there has never been any identification of the precise one hundred in which the vendee (Watts) has a property under this sale. On the 4th of August, 1862, Grenad sold the balance of the "Lester stock" to J. M. Hendry, and by virtue of subsequent sales, the property in the balance of the stock, exclusive of the one hundred sold Watts, became vested in Neal Hendry, the defendant, he assuming the liability for plaintiff's claim and having full knowledge of the facts recited as to the sale. The defendant thus became possessed of the entire "Lester stock," among which were the one hundred purchased by plaintiff as aforesaid. On the 23d of October, 1862, the defendant and John M. Hendry joined in a note to the plaintiff in the language following :

MADISON C. H., October 23, 1862.

MR. JOSEPH B. WATTS—DEAR SIR :—As you hold a claim for one hundred steers, two years old last spring, out of the stock known as the "Lester stock," owned by us, and as several months have passed since you bought them and you have not yet got said cattle out of the stock, and to prevent any difficulty in the future, and as we are not willing to let them run and run the risk of the cattle and then allow you to claim the full number and increase of age, you are hereby notified to drive them out or alter the mark and brand by the 25th day of December next, or this notice shall be a bar to any claim held by you or any other person in your name.

Yours respectfully,

NEAL HENDRY,
JOHN M. HENDRY.

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It is not made to appear that plaintiff paid any attention to this notice, and the entire stock remained on the range unseparated. Since this notice, the defendant, believing that it was a bar to the plaintiff's right, has exercised dominion and control, to the exclusion of the plaintiff, over the entire Lester stock, including of course the one hundred head of the plaintiff's and has made sales of a number of this stock at various times. Under this state of facts, plaintiff brings an action of trover, and upon this evidence substantially there is a verdict and judgment for the defendant, and the plaintiff prosecutes an appeal to this court.

There are several errors assigned, but we think it necessary to consider only the last assignment, which is "that the court erred in refusing to grant the motion for a new trial, the verdict being clearly contrary to the law and the evidence."

The appellee here relies upon two points to sustain the judgment:

First. It is contended that plaintiff did not have a right of possession to the cattle, as there remained something to be done upon the part of the vendor which was necessary to complete the sale, viz: the gathering, separating and delivery of the one hundred head of cattle; that the separation and identification of the one hundred cattle was necessary before the vendee could acquire a property in any specific chattel, or a right to the possession of any specific chattel, which it is claimed is necessary to maintain trover.

Second. It is contended that "even if it should be considered that the defendant was in possession of the cattle in dispute, and that he knew of the sale to the plaintiff, and had agreed with the plaintiff to gather them and separate them from the herd and deliver them to the plaintiff, he would in law, and upon this state of facts, have been a bailee of the plaintiff, and a demand and distinct refusal would have been necessary before trover could be maintained."

As to the last point, we remark that when a person as-

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sumes to exercise control and dominion over the chattel of another in opposition to and with a knowledge of the right of the true owner, as in this case, it makes no difference whether he is in possession as bailee or otherwise; it is a conversion, and no demand or refusal is necessary. Demand and refusal is at most nothing more than evidence of a conversion, and when it is otherwise proved, this particular character of evidence is unnecessary. Because the defendant may have been a bailee, does not render it impossible for him to have been guilty of a conversion in some other way except by resisting the demand of the true owner. Suppose he sells the chattel, or, as in this case, he notifies the owner to come and get his property, and if he does not that he will deny his ownership and lay claim to the property, and does actually claim it as his own, we have here a conversion independent of demand, and, as a matter of course, a demand is unnecessary.

The only witness examined to the point in this case states that the defendant has, since the notice, exercised control and ownership, to *the exclusion of plaintiff*, over the whole mark and brand of the Lester stock. If this be true, and there is no conflict in the evidence upon the subject, we are entirely satisfied that the case, so far as the matter of conversion was concerned, is fully made out, and that the evidence and law is plainly with the plaintiff. What acts may be done by a party coming lawfully into the possession of the property of another, and his precise duty in reference to it, is fully discussed in the preceding case of Robinson vs. Hartridge, and we deem it unnecessary to go over the same ground here. As to the first ground upon which defendant seeks to sustain the judgment, we think it may be admitted, for the sake of argument, that if the defendant had remained passive and had made no acknowledgment of property, in the plaintiff, that the defence would have been good and it would not affect this case. A different case is presented when defendant admits the property of the plaintiff in cattle of a given age

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and number in his possession. After this he is estopped from saying that plaintiff has no property or right of possession because of a want of identification and separation in the original sale.

In *Steward vs. Dunkin*, 2 Camp., 344; it was expressly held by Lord Ellenborough that a warehouseman who, on receiving an order from the seller of malt to hold it on account of the purchaser, gave a written acknowledgment that he so held it, could not set up as a defense in trover for not delivering it to the purchaser, that the property in the malt sold was not transferred until it was remeasured. Lord Ellenborough there says: "Whatever may be the rule between buyer and seller, it is clear the defendants cannot say to the plaintiff, 'The malt is not yours,' after acknowledging it to be his." *Haws and Another vs. Watson and Another*, 2 Barn. & Cress., 540. A. sold to B. a quantity of tallow at so much per cwt., and gave a written order to the wharfinger to weigh, deliver, transfer and rehouse the same. B. sold it to C., giving C. an acknowledgment of the wharfinger that he had transferred it to C. B. became insolvent, and A. gave notice to deliver to B. It was held that after the wharfinger's acknowledgment, they could not set up as a defence a right in the original vendor to stop in transitu because something remained to be done on the part of the seller to make a perfect delivery.

The vendor, Grenad, in such a case as this, in the event the price had not been paid, would have perhaps had a seller's lien, as there was no such surrender of actual possession as would have divested it, but this is not the case here.

Lord Ellenborough in *Hanson vs. Meyer*, 6 East, 614, says that "if anything remains to be done on the part of the seller as between him and the buyer before the commodity purchased is to be delivered, a complete present right of property has not attached in the buyer, and of course this action, (trover,) which is accommodated to, and depends upon such perfect right to property, is not maintainable." This case

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was between the vendor and vendee, where the vendee became bankrupt before payment or delivery, and it seems to have given the general rule, both in England and the United States, for determining when and under what circumstances as between buyer and seller, where the price was not paid, a present right of property and possession attaches, so as to maintain trover. There is a great difference, however, between cases of this character, *where no price has been paid*, and where, upon principles of equity in cases of incomplete sales, a seller's lien, or a right of stoppage in transitu is permitted to operate for the protection of the vendor in cases of insolvency or bankruptcy of the vendee, and this case. In the case just referred to, Lord Ellenborough held that it was essential under the terms of the agreement that the chattel should be weighed before the price could be ascertained or a delivery be made, and no such complete right of property had vested in the vendee as to enable him to maintain trover. Most of the cases cited by appellee are between the vendor and vendee, or the creditors of the vendee, where the price had not been paid, and the vendor remaining in possession availed himself of the omission to weigh, measure or select, or of his right of stoppage on account of the insolvency of the vendee and non-payment of the price. In this case the price had been paid, and the vendor, by giving a delivery order, acknowledged upon his part that he held the cattle subject to vendee's order. If the property remained in the vendor or he was entitled to the possession *in his own right*, after payment of the price and the execution of the delivery order, it would present the strange case of a party having property in a chattel after he had been paid for it, and after he had acknowledged the right of possession to it in another. Here the vendor and vendee plainly show their intention to pass the property, and the subsequent dealings of the defendant with these parties show that that was his understanding of the matter. As remarked by the Court of Appeals of New York, we may safely say that while many of the au-

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thorities may suggest a doubt whether a title passes upon a mere sale of a part from a mass without a separation or identification of that part, yet if it be clear that it was the intention and design of the parties that the title should pass, no decision announces the extreme doctrine that there is a legal impossibility in the way of accomplishing that design. These views are fully sustained by the decision of the Supreme Court of Massachusetts in 20 Pick., 284, and in 13 Pick. 182, by the court of appeals of New York, in 19 New York, 330, by the Supreme Court of Maine, in 37 Maine, 418, and by the court of appeals of Virginia, in 6 Rand., 473. In the last case there was a sale of a portion of a lot of flour; the vendor took the draft of the vendee in payment for the flour, gave a receipt for the price and an order to the vendee upon the keeper of the warehouse where it was stored. Say the court, "the vendee would hardly have paid his money without getting what he considered equal to an actual delivery; he got the order directing the warehouseman to deliver him one hundred and nineteen barrels of flour of specified brands. Looking at this contract as the parties did at the moment of making it, can we doubt for an instant that they considered it complete, that each party had done all that he had to do with it? And the intention of the parties we know is of the essence of contracts. This seems the common sense practical view of the subject, and it is fully supported by the law." These remarks may well be applied to this case. In reference to the subject of delivery in this case, we deem it proper to remark that upon a sale of cattle upon the ranges, wandering hither and thither in immense herds, and often remaining for a term of years in inaccessible swamps, it may not be the custom to immediately separate the number sold from a large herd or stock, but to wait until some particular season when they are driven up. If there be such a custom, it would have great weight in determining the *intentions of the parties* in contracts of this character. In such a case, we would not be inclined to apply with rigid

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strictness this rule of the common law, applicable for the most part to inanimate chattels, or to animate chattels capable of easy identification, and which it was always the custom to weigh, measure, separate or identify, before the sale was considered complete. We regard this case as much stronger than most of the cases last cited, because defendant here admitted the property and right of possession of the plaintiff. It falls more clearly within the principle of the cases reported in 2 Camp, 344, 2 Barn. & Cress., 540, and the like cases alluded to in the subsequent portion of this opinion.

In this case the defendant purchased the entire "Lester stock" knowing that plaintiff had *purchased and paid for a certain number of a certain age of this stock*, and with this knowledge defendant addresses plaintiff a notice advising him that he knew that he, plaintiff, had purchased the cattle several months before, complaining that plaintiff has not moved the cattle, (thereby admitting his right so to do,) and notifying him to drive them out by a given time, or in the event he failed, that the notice should be a bar, &c. Here is a clear admission by defendant that he was at this time possessed of the cattle which are the subject of this action, and here is an express acknowledgment of property in the plaintiff in the cattle, and an invitation to come and take his (plaintiff's) property thus acknowledged to be in his (defendant's) possession.

In the case of Gillet vs. Hill, 2 Crompton & Meeson, 2, it appeared that plaintiff had purchased flour of one Orbell, taking an order upon defendants for the delivery of twenty sacks of flour. This order was presented to defendants' foreman, who said they had not more than five sacks to spare, and they might have that. Defendant's clerk took the order and filed it. The defendants delivered to plaintiff five sacks upon another order the same day, and on the next day upon application for the balance, they said that plaintiff should have it as soon as they got any. Shortly after this another application was made, and defendants replied that they had

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no flour of Orbell's to deliver. It was objected for the defendant that no specific sacks of flour had been selected or appropriated so as to vest a property in the vendee, and that trover was not maintainable. Plaintiff contended that the acceptance of the delivery order for twenty sacks was a virtual appropriation of that quantity to the plaintiff's use.

The question of acceptance was left to the jury, and there was a verdict for plaintiff. There was a rule for new trial upon which Vaughn B. said, "The defendants having accepted the order, admit the plaintiff's right to call upon them to deliver twenty sacks of flour. If they were not in a condition to comply with the order, they should have communicated that fact when the order was delivered. But then it is said that the defendants have not appropriated any *particular* sacks, and several cases have been cited to this effect. In all those cases, however, if they are examined, it will appear that it was held essential that certain acts should be done, as weighing, &c., before the property vested, and as these acts had not been done, the plaintiff failed to prove an absolute property in himself. Here, however, the defendants admitted that they had twenty sacks in their possession, (the property of Orbell,) and they afterwards refuse to deliver fifteen of the number. I think there is sufficient evidence of property possession and conversion to sustain this form of action."

So we think in this case defendant cannot set up that certain acts were necessary to pass the property as between vendor and vendee, when he has admitted generally the property of the plaintiff in the cattle.

The value of cattle is as frequently estimated by age as in any other way. A conversion of a given number of a certain age is here established, and we see no difficulty in the case. On the other hand, a judgment for the defendant gives him a property in the cattle, and the plaintiff is deprived of his property without a remedy, for if trover is not

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maintainable here, it is our opinion, as at present advised, that the plaintiff is remediless, and that a party who acquired possession of property with full knowledge that it had been purchased and paid for by another, and who had admitted the general property of that other, will be permitted to convert that property to his own use at the expense and loss of the true owner.

The judgment of the court below is in conflict with the law as applicable to the true state of facts in this case, and no one can doubt that its consequence is to give one man the property of another without any the least compensation.

The judgment is reversed and a new trial is awarded.

RODNEY DORMAN, APPELLANT, VS. THE CITY OF JACKSONVILLE, APPELLEE.

1. If the council of a municipal corporation act within the scope of their authority in the grading and improving of streets, they are not liable at common law to an action of trespass or case by the owner of an adjoining lot, who may be injured by such improvement.
2. Nor does a provision in the act of incorporation that the council must "make to the party injured by an improvement a just compensation," to be ascertained in such manner as is provided in the act, make the corporation liable to an action for such injury. There being no right of action at common law, the remedy created by the Legislature must be pursued.
3. A declaration alleging that a city council, "contriving and unjustly intending to injure, prejudice and aggrieve the plaintiff, and to incommode and annoy him in the occupation and enjoyment of his property," dug away his sidewalk, destroyed his shade trees, and created a nuisance in front of his premises, shows a cause of action at common law, the acts thus charged being in violation of law, and is not demurrable under the city charter which authorizes the grading and improvement of streets.

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Appeal from the judgment of the Circuit Court for Duval county.

The case is stated in the opinion of the court.

W. Call for Appellant.

Acts done in pursuance of a power must carry into effect the object of the power. If the power be to *improve*, the act must not be to *injure*. The statute of Westminster gives a remedy by action on the case to all who are aggrieved by the neglect of any duty created by statute. 2 Inst., 486. Authority given by statute is conditional, that it shall be used for that purpose only for which the law allows it. Arch. N. P., 421. The Legislature cannot take property without making compensation. 2 S. C., 165, 473; 1 Bald., 230.

The second and most important error of the Circuit Court rests on this proposition: The charter gives the city of Jacksonville power to "improve the streets," and in terms imposes a condition or limitation upon the power, requiring it to make compensation to the party injured by assessment on those benefitted by an improvement, (Charter, Acts of 1841,) and the declaration specially declares in its count on the defendant's liability under this provision.

The case of Smith vs. The City of Washington, 20 How., is unlike the present case. The Supreme Court there held, first, that the power to "improve the streets" carried with it the power to alter the grades without reference to grades before established by the city authorities; second, that the consequential injuries or damages to property arising out of the *lawful* execution of this power were *injuria sine damnum*. The principles of that case do not affect the plaintiff's right of recovery.

Artificial persons, like corporations, can exercise no power except such as is conferred on them. 2 Cranch, 121; 5 Wheat., 326.

Where a charter grants certain things affecting the public, and requires performance of certain conditions, the cor-

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poration is liable to an action on the case for the non-performance if, in consequence, an injury happens to an individual. Grant on Corporations, ¶63, (78 Law Library.)

A street is a public highway. The property in the soil of a highway is in the owner of the adjoining land, who may maintain trespass for digging the ground of the highway. 44 Law Library, 84-5. Grass, herbage, trees that are set out in the highway, belong to the adjoining proprietor. *Ib.*, 86.

The term *nuisance*, as applied to real property, signifies anything done to the permanent hurt or annoyance of the lands, tenements or hereditaments of another. 2 Cobb's Law of Real Property, 1067.

Case is maintainable where the enjoyment of a right has been hindered. 1 Smith's Lead. Cases, p. 133, note; Ashley vs. White and Carpenter's case, *ib.*

Neither the ownership of the soil nor the easement is in the corporation, (2 Smith's Lead. Cases, 2 Vt., 480,) but the easement is for the benefit to the public.

The power to repair, alter or extend the streets or improve the easement is in derogation of a common law right, and must be construed in connection with it, and strictly. "So that anything which obstructs the way is a public nuisance," and gives trespass to the owner. 1 Conn., 132; *Dovaston vs. Paine, supra.*

"The King cannot confer a favor on one subject which occasions injury and loss to others." 3 Inst., 236; Broorne's Leg. Max.

The questions presented by this record are:

1. Was the act done in pursuance of the power granted?
2. Was it an injury to plaintiff's property?
3. Is an improvement in the streets of Jacksonville, when it damages property, to be paid for?
4. If it was not an "improvement," it was not in pursuance of "the power," and case lies.

If it *was* an improvement, compensation is required by

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the terms of the charter as a condition, and case lies for non-performance of the condition.

The declaration concludes both these points. It declares, first, it was not an improvement, neither an alteration of grade, nor other lawful act, but an excavation of plaintiff's sidewalk, a removal of the earth and carrying away his trees, which made a nuisance and disturbed his enjoyment of the easement of way, and damaged the value of his property. Second, it declares that said act was without the assessment or payment of damages as required by the charter.

On both these points the declaration makes out a case, and the demurrer admits the facts, and asserts as a consequence, that no action lies for a nuisance or for damages resulting from a departure from its chartered powers by a municipal corporation, an affirmation which is without reason or authority.

J. P. Sanderson for Appellee.

The questions of law presented by the demurrer are:

1. Whether the corporation, the defendants, have power under the charter to change the grade or alter Bay street, or acted wrongfully and unjustly in so doing.

2. If the act was lawful, were the defendants bound to compensate the plaintiff for the injurious consequences, if any, to his property? And

3. Whether, if defendants are liable for the alleged injury, plaintiff can recover in this form of action, or is restricted to the remedy prescribed and provided in the charter.

The determination of these questions depends upon the proper construction of the charter.

The clause of the charter set forth in the declaration, and applicable to this case, is in 3d section, and is in the following language, viz: "They shall especially have power to regulate, improve, alter and extend the streets, lanes, avenues and public squares, and to open new streets, and to cause encroachments, obstructions, decayed buildings and old

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ruins to be removed, making the parties injured by any improvement a just compensation, and charging upon those benefitted a reasonable assessment, to be ascertained in such manner as shall be agreed upon by the parties, or by a jury of twelve men, to be organized in such manner as by ordinances the said council shall prescribe."

Under this grant of power no question can arise as to the authority of the defendants to alter or grade Bay street, and the act complained of was therefore lawfully done. The power to regulate, improve and extend the streets is the ordinary power usually confined to corporate bodies for municipal purposes, as in all other cities and towns the legal title to the public streets is vested in the sovereign as trustee for the public, and consequently can only be regulated by the Legislature or by such individuals or corporations as are authorized by the Legislature.

The power over the streets in the city of Jacksonville has, by the charter, been conferred upon the city council, as the representatives of the body corporate, to the same extent as that possessed by the Legislature itself.

The city can, therefore, be held liable for such damages only as the State would be if done by its authority—for example, in cases where private property is taken for public use.

In this case no private property has been appropriated to public use. The city has only used its own lawfully and is not liable for consequential damages. 1 Pick., 417; Redfield on Railways, p. 156, sec. 2, and notes.

This whole question is fully and elaborately discussed in the following cases: 20 How., 147, authorities cited in the above cases; 9 Watts, 282; 18 Penn., 187; 1 Am. Railway Cases, note to page 166.

The authorities cited clearly establish the first proposition.

Second—Are defendants bound to compensate the plaintiff for any injurious consequences to his property?

The defendants were in the exercise of a public function,

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and are not liable to an action for damages consequentially resulting from the act done, unless done in a careless, unskillful and negligent manner. What was done it was lawful to do, and if the plaintiff was injured or incommoded, it was *damnum absque injuria*, and gave no right of action against those who only exercised a legal power vested in them for the public convenience and welfare. 4 N. Y., (4 Con.,) 195; 2 Hill, 466; 3 Barb., 459; 17 Ind., 267.

The plaintiff does not charge that any of his land was taken (except what he had placed in the public street, which gave him no right,) from the street by defendants, but complains that the sand, &c., in the street along the front and in the vicinity of his lot was removed. In doing this, unless the city council exceeded their jurisdiction, they are not responsible for collateral consequences. The interest of individuals must give way to the accommodation of the public. 1 Denio, 597; 2 John., 283; 4 D. & E., 794; 6 Taunt., 29, E. L. R.; 1 American Railway Cases, note to pages 166-7-8-9-10.

But it is contended that the clause "making the parties injured by an improvement a just compensation, and charging upon those benefitted a reasonable assessment," limits and qualifies the power granted in all the cases previously enumerated, and in every case renders the defendants liable for compensation for any damage, whether mediate or consequential.

This, I contend, is not reasonable, proper or legal construction to be given to the language used in the charter. The evident intention was to provide the means and manner for compensation in cases where injury might be done by the use or appropriation of private property, or interfere therewith by removal, &c., and not to *create a liability* in cases in which the law had not previously recognized such liability.

To recognize a liability in this, by giving the construction contended for by appellant to the clause of the charter under consideration, would be to overturn well established and

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long settled principles. To sanction the principle that corporate bodies and individuals charged with the execution of public functions are responsible for consequential damage when acting within the scope of the power vested in them, and while performing those duties in a proper manner, would be to create an effectual bar to all works involving the convenience and welfare of the public. Such could never have been the intention of the Legislature.

A similar clause will be found in nearly every charter of this kind, and no case can be found giving the construction contended for by the appellant.

The decision in the case cited, viz: Smith vs. Corporation of Washington, 20 How., 147, fully sustains this construction. 1 Cranch, C. C., 98.

The act of Congress incorporating the city of Washington, Vol. 3, U. S. Stat. at Large, p. 587, sec. 8, contains a similar provision, and yet it was not considered by the court or counsel in that case as affording any remedy.

But should the court come to a different conclusion than the one contended for by appellee, then it is insisted

Third—That where there is a statutory remedy provided, that remedy *must* be *pursued*, and is exclusive. 8 Ohio, 543, cited in Abbott's Dig. on Corp., p. 500, sec. 186.

It is now fully settled that no action at common law can be maintained against parties executing a public trust under the authority of a statute for injuries which may be occasioned while in the proper exercise of the statutory power. 9 Conn., 436; 1 Am. R. R. Cases, note to page 170.

Therefore, if any right can be found by which the action can be sustained in this case, it must have been *created* by the compensation clause of the charter, and the plaintiff is restricted to the remedy therein prescribed.

This, then, was a new right, one which does not exist at common law, if any exists. When a statute gives a new right and prescribes a particular remedy, such remedy must be *strictly* pursued, and is *exclusive* of any other. 1 Mann,

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(Mich.,) 193; Redfield on Railways, 173-4-5, and notes; 13 Barb., 209; 1 Am. R. R. Cases, note to page 166, and remarks, &c., Lord Kenyon in note page 168.

The remedy pointed out by charter has not been pursued, but an action sounding in tort adopted, for this reason demurrer should be sustained. 4 Dunf. & East. Demurrer proper mode of raising question. 3 Brev., 396.

This is an action on the case, and the statute under which that suit was brought authorized the commission to make compensation, as in this, and Buller, J., says: "The question here is whether or not this action can be maintained, and I am clearly of the opinion that it cannot, because a particular remedy is pointed out by the act." See comments on this case in 1 Railway Cases, note to page 167, vol. 1; 1 Cr. C. C., 98.

If the compensation clause contained in the charter is to be construed, as contended for by appellant, to be a limitation, condition or qualification on the exercise of all the powers enumerated as granted by the charter, and thus create a liability where none existed before, it then becomes an affirmative statute, introductive of a new law. In that case, the remedy prescribed by the statute is the only one available for relief. Dwarris on Stat., 641.

RANDALL, C. J., delivered the opinion of the Court.

The appellant commenced an action against the appellee, and alleged in his declaration that he was the owner of a lot in the city of Jacksonville, (an incorporated city in this State,) on the north side of Bay street. That as such incorporated city, it has the power to regulate, improve, alter and extend the streets, to open new streets, and to cause encroachments, obstructions, &c., to be removed, "making the parties injured by an improvement a just compensation, and charging upon those benefitted a reasonable assessment, to be ascertained in such manner as shall be agreed upon by the parties or by a jury of twelve men, to be organized in such

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manner as by ordinance the city council may provide." This power is conferred by the city charter. The declaration alleges further that "the defendant, well knowing the premises, but contriving and wrongfully and unjustly intending to injure, prejudice and aggrieve the plaintiff, and to incommode and annoy him in the possession, use, occupation and enjoyment of the said lot, with the appurtenances," did, on the 1st of July, 1866, dig up and carry away from Bay street, along the front of said lot, large quantities of sand, earth and gravel, some of which the plaintiff had purchased and spread there for a sidewalk in front of the lot, digging away, tearing up and undermining the sidewalk of the plaintiff, and also digging away the earth from the shade trees and carrying it off, depositing it in the street in front of the property of others, digging up and carrying away the said shade trees, which were ornamental, useful and valuable, and a necessary protection against fire, leaving the street and sidewalk in a ragged and incomplete condition, exposing the same and the lot to damage by washing and undermining, making the lot and the buildings thereon difficult and inconvenient of access, and making it difficult to cross the street from his premises, and causing the water to stand in the street in front of his property to his great injury, making him no compensation for said injury, &c.

To this declaration the defendant interposed a general demurrer. The court sustained the demurrer, and the plaintiff appealed.

The appellant assigns for error that the court erred in sustaining the demurrer and giving judgment against him.

I do not understand that the plaintiff claims that the defendant is liable in this action, if the acts complained of were done in pursuance of and in conformity to the provisions and the power granted by the act of the Legislature authorizing the city council to grade and improve the streets, but that if the acts done were not in pursuance of this power, or the thing accomplished was not authorized to be done, the action

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lies, and the judgment of the Circuit Court was erroneous. In this proposition the court must concur, and also that if the act done by the defendant was in pursuance and conformity to this power of the city council, and in consequence thereof the plaintiff sustained damages, he is entitled to compensation by the *terms of the charter*.

But it is insisted by the appellant that the authority to grade the street in front of the plaintiff's premises is limited and *conditioned* upon making compensation for the injury, if any injury follows, and that as the defendant, by demurring, admits the premises alleged, and it does not appear that such compensation has been made, the defendant is liable in this action. To this conclusion I cannot agree.

By the terms of the city charter, the making compensation for an incidental injury, occasioned by making a public improvement, as by grading or leveling a street, does not precede the making of the improvement and causing the injury. No injury is sustained until the "improvement" is effected or commenced. There can be no "compensation" due until, the improvement being made, it is ascertained that there is an injury, and the extent of it to be compensated. Whether there will be an injury to a lot in a city by the leveling of the street in front of it, by digging it down or filling it up, can scarcely be determined until it be ascertained whether the lot is made more or less valuable by the grading or leveling. The particular location and the surroundings of the lot and of adjoining property, the making it more accessible, or the placing of impediments and permanent obstructions in the way, making it inconvenient of access, creating a nuisance in the vicinity of it, and numerous other incidents may be taken into the account in determining whether the property is injured or benefitted, and these cannot always be calculated upon until the work is done or in progress. And most assuredly no action can be maintained, either for a trespass or for compensation for an injury, until the trespass is committed or the injury sustained. It seems clear that the

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“just compensation” mentioned in the charter cannot be required to be made before the damage is sustained.

If the opposite construction should prevail, it might be insisted, by the same logic, that the city might, *in advance*, “charge a reasonable assessment upon those benefitted” by the improvement, the language conferring the authority to make compensation and to change an assessment for benefits being in the same paragraph and a part of the same grant of power, the injuries and the benefits “to be ascertained in such manner as shall be agreed upon by the parties or by a jury” to be provided by ordinance.

I cannot, therefore, consider that the plaintiff is entitled to recover upon the ground that compensation was not made as a *condition* upon which the city is authorized to act in making improvements upon the streets, or, in other words, that the action of the city was unlawful or unauthorized because compensation was not made. In this I do not confound the taking of private property for public purposes with the exercise of municipal discretion in improving a street already dedicated to, or the permanent use of which, as an easement, has been paid for by the public, there being a vast difference between the invasion of private property, disturbing the exclusive right of possession of the owner, and the improvement of public highways, which are properly under the control of the public for legitimate purposes, notwithstanding that the fee of the soil remains in the original owner or his grantees.

The question then arises, whether an action at law can be maintained by the owner of a city lot against the city or its employees for the grading of streets adjoining it, irrespective of any provision of law providing compensation for injuries sustained by the adjoining owner. The case of *Callender vs. Marsh*, 1 Pickering, 418, is a leading and standard case in this country, and has been, it is understood, cited and approved by the Supreme Court of the United States, and by the courts in every State but one in the Union. The court

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in that case say that there has been no construction given to the provision (relating to compensation for private property taken for public use,) which can extend the benefit of it to the case of one who suffers an indirect and consequential injury or expense by the right use of property, the use of which already belongs to the public. It has ever been confined in judicial application to the case of property taken and appropriated by the government. The street "being established, although the title in the soil remained in him from whom it was taken, yet the public acquired the right, not only to pass over the surface in the state it was in when first made into a street, but the right also to repair and amend the street, and for this purpose to dig down and remove the soil sufficiently to make the passage safe and convenient. Those who purchase house lots bordering upon streets, are supposed to calculate the chance of such elevations and reductions as the increasing population of a city may require in order to render the passage to and from the several parts of it safe and convenient, and as their purchase is always voluntary, they may indemnify themselves in the price of the lot which they buy, or take the chance of future improvements as they shall see fit. * * Every one who purchases a lot upon the summit or decline of a hill, is presumed to foresee the changes which public necessity or convenience may require, and avoid or provide against a loss.

* * * That it might be proper for the Legislature, by some general act, to provide that losses of the kind complained of in this suit should be compensated by the town or city within which improvements may be made for the public good, or by the owners of land which may be particularly benefitted, is not for us to deny; but without such legislative provision we have no authority on the subject, it being clear that by the common law, as well as by our statutes, the defendant in this action is not liable. In no case can a person be liable to an action as for a *tort*, for an act which he is authorized by law to do." *Thurston vs. Hancock*, 12

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Mass., 220, and Parton vs. Holland, 17 Johnson, 100, are referred to as fully sustaining this position. The action referred to was trespass for digging down the street by the plaintiff's house in Boston and taking away the earth so as to endanger the falling of the walls, in consequence of which he was obliged to build new walls at great expense to preserve his property and render it easy of access as it was before, and this after the house had been standing for twenty years.

The Supreme Court of the United States in *Smith vs. The Corporation of Washington*, 20 How., 135, where similar injuries were alleged to have occurred in consequence of the cutting down shade trees, removing a wall and the pavement, digging down the street and thereby obstructing the ingress and egress, injuring the value of the property and compelling the plaintiff to pay large sums of money to enable her to use and occupy her house, quoted approvingly the decision in *Callender vs. Marsh*. The case had been tried by a jury, the court below instructing them that "the defendants cannot be responsible in damages in this action, unless from the evidence the jury shall find that said change was made wantonly, wilfully and maliciously." The declarations alleged that the "defendants unlawfully, wrongfully and injuriously" cut down the shade trees, &c. The questions arising and which were considered by the Supreme Court were "whether the corporation *had power* to change the grade of the street, or acted unlawfully and wrongfully in so doing;" and "if the act was lawful, were the defendants bound to compensate the plaintiff for the injurious consequences to her property?" (The first of these questions does not arise in the present case, the power to improve or alter the streets being too plain for question, by the terms of the city charter.)

The court says that the defendants "having performed the trust confided to them by law, according to the best of their judgment and discretion, without exceeding the jurisdiction

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and authority vested in them as agents of the public, and on land dedicated to public use for the purposes of a highway, they have not acted unlawfully or wrongfully as charged in the declaration. They have not trespassed on the plaintiff's property, nor created a nuisance injurious to it, and are consequently not liable to damages where they have committed no wrong, but have fulfilled a duty imposed on them by law, as agents of the public. The plaintiff may have suffered inconvenience and been put to expense in consequence of such action; yet, as the act of defendant is not unlawful or wrongful, they are not bound to make any recompense. It is what the law styles '*damnum absque injuria*.' Private interests must yield to public accommodation; one cannot build his house on the top of a hill in the midst of a city, and require the grade of the street to conform to his convenience at the expense of that of the public." The cases of Callender vs. Marsh, 1 Pick., 417, Green vs. Reading, 9 Watts, 282, O'Connor vs. Pittsburg, 18 Penn. Rep., 187, are quoted and approved as leading and authoritative cases, and the views expressed are considered as the settled law in this country.

A distinction is attempted to be drawn between the case at bar and that of the corporation of Washington, because of the peculiar nature of the grant of the land covered by the city. It was conveyed to trustees to be laid out as a federal city, with such streets, lanes, avenues, parks, &c., as should be approved by the President, and so the soil in the streets belonged to the city in fee. Without entering into an argument upon this suggestion, it may be remarked that there is nothing before us to show by what tenure the city of Jacksonville claims the control of the soil in the streets, and if there had been, we cannot see that it would change the *status* of the parties, the city having in any event full power to make and change the grade of the streets for the convenience of travel and business. Nor is the decision of the Supreme Court of the United States in the case referred to

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controlled by the character of the title of the city to the soil in the streets.

The conclusion is, then, that if the declaration alleged that the city council acted within the scope of their legitimate powers, they would not be liable in this form of action.

That the city council must make "to the parties injured by an improvement a just compensation," imposes upon it the duty to hear and consider claims to such compensation, and make provision therefor in the manner provided by law. If the city council neglect their duty in this regard, they are liable to such measures as may be taken against them for a refusal to comply with a requirement of the law. The proposition that where a remedy is created by statute where none before existed must be pursued, is too well established to require argument. The authorities cited upon this point are ample and pertinent.

But the conclusion that the city is not liable to this action for damages sustained by parties in consequence of making public improvements under authority of law, does not dispose of this case.

The question properly before the court is upon the demurrer to this declaration. It alleges that the defendant, "contriving and unjustly *intending to injure, prejudice and agrieve the plaintiff*, and to incommode and annoy him," dug away his sidewalk, destroyed his shade trees, and created a nuisance in the street in front of his premises. More apt language to allege a willful violation of law, and the doing of malicious mischief and injury to the plaintiff and his property, can scarcely be conceived. The defendant takes no issue upon this, but demurs and says that no cause of action is stated, and though the allegations be admitted, the plaintiff is not entitled to recover.

This is admitting too much. In *Smith vs. Corporation of Washington*, the court premises that the gravamen of that case was not a trespass on the property of the plaintiff, or the taking down a wall or removing shade trees thereon,

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nor the erection of a nuisance on the public highway, nor a willful, malicious or oppressive abuse of authority in order to injure the plaintiff. The jury had found the contrary, and the question was whether the city was liable for the consequences of *lawful acts*.

The plaintiff here has stated a serious cause of action, a violation of law by the defendants, whereby he has suffered. The circuit judge doubtless decided the question upon the demurrer without reference to the language of the declaration introducing the charges brought against the defendant; but as our attention is called to the language of the pleading, we must pass upon it as it is written, and it follows that the judgment of the Circuit Court must be reversed.

CHARLES F. BEMIS, PLAINTIFF IN ERROR, VS. WM. MCKENZIE, DEFENDANT IN ERROR.

1. Under the rules, a plea of non-assumpsit is not a proper plea to a declaration upon a promissory note, but when the declaration contains other counts to which the plea of non-assumpsit is applicable, it is improper to strike out the plea as a nullity, unless a *nolle prosequi* be entered as to the other counts. The rule that the plea of non-assumpsit shall not be interposed, relates to suits upon bills of exchange and promissory notes, where they are the only causes of action upon which the plaintiff declares.
2. A promissory note indorsed after due, is transferred subject to the same conditions as to demand of payment and notice of dishonor as though it were endorsed before due. The indorsement is a conditional contract to pay in the event of a demand, or due diligence to make a demand, on the maker and his default.
3. The law of another State upon a subject matter in litigation is considered to be the same as the law of this State, until shown by due allegation and proof to be otherwise.

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Error to Circuit Court of Madison county.

The case is fully stated in the opinion of the court.

Papy & Peeler for Plaintiff in Error.

It is maintained for the plaintiff in error that the court erred in striking out the plea of general issue.

The general issue was good as to the common counts.

If the plea was defective because it may be said to have extended to the whole declaration and not limited to the common counts, advantage could only have been taken of this by demurrer, and the court in that case should have granted leave to amend.

Where a plea extends to the whole declaration and is only applicable to a part, plaintiff may demur. Archbold's Civil Pleading, 168.

But under the recent rules, where the declaration containing a count on a bill or note, and also common counts, and the plea of non-assumpsit goes to the whole declaration, the plaintiff may sign judgment on the special count as for want of a plea and enter a *nolle prosequi* as to the common counts. 1 Chitty Pl., 515, note A.

Manifestly because the plea of non-assumpsit is good as to the common counts; if they remain, judgment for want of a plea cannot be taken. If not, then it equally follows that the plea cannot be stricken out unless the plaintiff had first entered a *nolle prosequi* as to the common counts.

We maintain that the court also erred in sustaining the demurrer to the 2d, 3d, and 4th pleas of the defendant.

The endorser of a note endorsed after it became due is equally entitled to notice of a demand of the maker as if endorsed before it fell due; and a demand and notice is as necessary in the one case as in the other to charge the endorsed. 2d New Hamp., 159; 6 Eng., 507; 14 Ark., 334; ib., 127; 7 Porter, 176; 18 Pick., 260, and authorities there cited; 12 Martin's La., 176.

Whether the note be payable to bearer or order can make no difference. 7 Porter, 176; 9 Johnson, 121.

A note payable to bearer though transferred by mere delivery, may also be transferred by endorsement of the payee, in which case the endorser incurs the same liabilities and obligations as the endorser of a negotiable note payable to order. Story on Promissory Notes, sec. 132; Ch. on Bills, 12, Am. ed., 487, mar. p. 433.

A. Patterson for Defendant in Error.

The endorser of the note corresponds to the drawer of the bill; the maker to the drawee or acceptor, and the endorsee to the payee or party to whom the bill is made payable. When this point of resemblance is once fixed, the law is fully settled to be exactly the same in bills of exchange and promissory notes. 6 Bac. Abr., 771.

The endorser is the same as the maker of a new note; it is the making of a new contract between the endorser and endorsee. 1 Fla. Rep., 301.

If the draft be over due, this would amount to notice of some defect. Millen's Digest, 626; 15 Ga. Rep., 252.

If after dishonor of the note, the endorser promise to pay, such promise is evidence of due demand and notice. 7 Conn. Rep., 523.

No form of notice to the endorser of a promissory note has been prescribed by law. 1 Am. Lead. Cases, 368; 11 Wheaton's Rep., 431.

The promissory note sued upon in this case was made in the State of Georgia, Fort Gaines; the makers and the endorser lived there, hence the laws of Georgia govern. The endorser is governed by the law of the place where the endorsement is made. Chitty on Bills, 167, 191.; Edwards on Bills, 185.

Statute law of any State or Territory is evidence in the courts of this State. Th. Dig., 342.

By the laws of Georgia, it is not necessary that the en-

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dorser should demand payment of the maker of a promissory note, and give notice of such demand to the endorser, in order to bind the said endorser, except which shall be given for the purpose of negotiation, or intended to be negotiated at a chartered bank, or may be deposited in a chartered bank for collection. Hotchkiss Statute Law of Georgia, 441; Code of Georgia, p. 526, section 2739.

WESTCOTT, J., having been counsel, did not sit in this case.

RANDALL, C. J., delivered the opinion of the court.

McKenzie, defendant in error, sued Bemis in the Circuit Court for Madison county as endorser of a promissory note executed by W. B. Gilbert and John H. Gilbert, dated February 8th, 1860, for the sum of four thousand nine hundred and fifty-eight and 70-100 dollars, payable on the first day of January then next, and endorsed by Bemis to the plaintiff, the declaration alleging that the note was presented for payment and dishonored, and defendant notified thereof. The declaration also contained several common counts, as for money paid, money had and received, and money found due upon account.

To this the defendant pleaded,

First. Non-assumpsit.

Second. That he endorsed the note after due, and that demand of payment upon the makers was not made within a reasonable time after endorsement.

Third. That no notice of such demand within a reasonable time was given.

Fourth. That no notice of demand and non-payment had been given before the commencement of this suit.

The plaintiff moved to strike out the first plea on the ground that it is a plea of the "general issue, and as such, is inadmissible in an action of assumpsit under the rules of the court," and demurred to the other pleas on the ground

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that the note being past due when the endorsement was made, no demand or notice of non-payment was necessary.

The court struck out the said first plea and sustained the demurrer to the remaining pleas, and judgment was given for plaintiff upon the note.

The defendant assigns for error the striking out of the first plea, and the sustaining of the demurrer, and giving judgment for plaintiff.

The ground of the motion to strike out the first plea is that the general issue or non-assumpsit is inadmissible in an *action of assumpsit*. This ground is not tenable, because the rules expressly recognize the right to plead non-assumpsit in actions of assumpsit, except on bills of exchange and promissory notes. It is true that the plea of non-assumpsit as to the count upon the note might be properly struck out, or treated as a nullity, and upon entering a *nolle prosequi* as to the common counts, the plaintiff might take judgment. 1 Chit. Pl., 515, A. But the plea was good as to the common counts. The rule prohibiting the plea of non-assumpsit is confined to cases where the action is *only* on the note and on the promise to pay contained in or implied by law from it. It is to be read as if it were worded thus: In all actions on bills of exchange and promissory notes *simpliciter*, without any other matter. 2 M. & W., 721, 722.

The plea of non-assumpsit should be held to apply to the common counts and not to the count upon the note. The court therefore erred in striking out the first plea, as it was a good plea to an entire part of the declaration.

As to the demurrer, the court in sustaining it virtually decided that no demand upon the makers, or notice of non-payment, was necessary in order to change the endorser, the endorsement being made after the maturity of the note. The court, in *Berry vs. Robinson*, 9 Johnson, 121, held that a plaintiff was properly non-suited for not proving a demand on the maker and notice of default to the endorser. "Though the note was endorsed long after it was due, yet the endorsee

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took it subject to this condition. The books make no distinction on this point, whether the note be endorsed before or after it is due. The endorsement in every case, where a drawer really exists, is a conditional contract to pay in the event of a demand, or due diligence to make a demand on the maker, and his default." The same is held in 2 N. H., 159; 21 Maine, 455; 3 Humphreys, 171; 6 Ala., 865; 4 Man. & Gr., 101; 18 Conn., 361; 26 Maine, 271; 2 Nott & McC., 283; 1 McCord, 199; 2 ib., 398; 2 Rich. 67; 25 Me., 409; 3 Wend., 75; 8 S. & R., 351; 3 Bailey, (S. C.) 457; 2 Conn., 419; 18 Pick., 260; 9 Ala., 153, 160. And it makes no difference whether the note is payable to bearer or to order. Story on Promissory Notes.

But it is insisted by the defendant in error that the note is dated in Georgia, and that by the law of Georgia it is not necessary that demand should be made and notice of non-payment given, except in the cases of certain "Bank Paper."

The declaration, however, does not show that the note was made in Georgia, or that the parties to it resided there. The note, a copy of which is appended to the declaration, is dated "Fort Gaines," and the counsel says the court should take judicial notice that Fort Gaines is in that State. This is scarcely practicable, because there may be several localities bearing that name, and it is within the personal knowledge of members of this court that a place of that name is located in the State of Alabama. And in the absence of any express allegation or proof to the contrary, it is always held that the law of another State in reference to commercial transactions is deemed to be the same in the other State as it is in the State where the Court which hears the matter is sitting. The laws of other States and countries are matters to be proved upon a trial like other matters of evidence, and the laws of Florida have provided the manner of proving the statute laws of other States. There being no allegation

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that the note or the endorsement was made in Georgia, there is no foundation laid for the introduction of such evidence.

The demurrer was improperly sustained.

The judgment is reversed and the cause remanded with directions that the court take such further proceedings as may be according to law.

WM. H. GARLINGTON, ET AL., PLAINTIFF IN ERROR, VS. B. F. PRIEST, SHERIFF, &C., DEFENDANT IN ERROR.

1. After demurrer sustained to a plea, if the defendant by leave of the court files a new plea, he thereby abandons his former plea and the exceptions to the judgment on the demurrer; and the last plea being demurred to and the demurrer sustained, this court can review only the judgment upon the demurrer to the last plea.
 2. After successive pleas have been held bad, on demurrer thereto, it is error to enter a judgment for want of a plea; the proper judgment is a final judgment on the demurrer.
 3. The first section of "an act providing for the stay of executions in this State," approved Dec. 12, 1861, providing that "there shall be no sales under execution and judgments at common law or decrees in Chancery in this State, until twelve months after peace is made and proclaimed, or until otherwise provided by law, between the Confederate States of America and the United States of America, except by the consent of the defendant or defendants," provided, that in cases of levy the "defendant be required to give bond with security for the forthcoming of the property on or at the time above specified," is void as contravening the spirit of the constitution of the United States recognizing the establishment of the Confederate government, and contemplating the dismemberment and destruction of the Union of the States.
 4. When a party has filed his pleas and they are pronounced insufficient upon demurrer, it is not a matter of course that the defendant may plead *de novo*. The judge should exercise a sound discretion in permitting new pleas to be filed, and should inspect the plea offered, and if it is a mere
- S. C. R. ol. XIII.—37.

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repetition of a previous plea or is not a good defence, or seems to be interposed for delay, or if there is any other like good reason, he should refuse leave to file it.

Per WESTCOTT, J.:

Where a bond was given in 1861 for the forthcoming of slaves levied upon by execution, the condition of which was that the slaves should be delivered twelve months after peace should be made and proclaimed between the Confederate States and the United States of America; *Held*,

That the happening of the contingency mentioned was a condition governing the liability of the obligors, and that no breach of the condition having occurred, no action can be maintained upon the bond.

Error to the Circuit Court for Marion County.

The case is stated in the opinion of the court.

Gary and Rogers for Plaintiff in Error.

E. M. L'Engle for Defendant in Error.

I will consider at one and the same time all the pleas which attempt to raise substantially the defence of impossibility or illegality of performance, and will also at the same time consider the 4th amended plea, which pleads "that the event limited for the performance of the condition has not transpired." 11 Mass., 143.

The obvious meaning of the act of Dec. 13, 1861, was to allow defendants in execution to suspend the enforcement of executions *during the war*. It was to give relief to the debtor, (if he chose to avail himself of the provisions of the statute,) and security to the creditor who was obliged to accept it. The law was compulsory as to the creditor, but not on the debtor. 7 Fla., 20, 21; 4 Fla., 453; 8 Fla., 50; 11 Mass., 143.

It is *in pari materia* with the act of 15th March, 1844, (Th. Digest, 358,) and decisions under that act apply to this.

The bond, (its intention being so construed,) not being complied with by production of the *slaves* to answer the writs of *fi. fa.*, the obligors are liable. 8 Porter, 575; 5 Stewart & Porter, 126-'9; 8 Fla., 352.

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The writs of execution were satisfied by the giving of the bond, and if that be declared invalid and that no recovery can be had on it, the plaintiffs in execution may lose their debt. 4 Howard, 4.

The plea of destruction of the property by violence, irresistible force, or public law, that is to say, impossibility of performance, is not a valid, legal or equitable defence, inasmuch as the obligors by their own contract created the charge. It was not imposed upon them by law. The law only *permitted* them to assume the undertaking. 3 Kent's Com., 465-7, and cases cited; 6 Mass., 63; 2 Wallace, 1, and cases cited; 19 Wend., 500; 3 Dutcher, 515; L'Engle, adm'r, vs. Robinson, (decided at the January term, 1870, of this court.) Cases on this point examined and compared: 2 Sneed, 326; 4 Caldwell, 436; 5 Caldwell, 384; 41 Ala., 124; 23 Ark., 415; 19 La. Ann. R., 447-8-9; 38 Missouri, 306; 20 La. Ann. R., 152, 153; 34 Ga., 232; *ib.*, 368; 6 Dana, 122.

The 3d amended plea (which is the same as the 5th plea first filed.) pleads that the act of Dec. 13, 1861, so far as its provisions related to slaves, became abrogated and annulled by the abolition of slavery.

The statute was an existing valid law at the time the bond was given, and slaves were then property, and lawful subjects of contracts as such. The expiration of the law, its repeal or the abrogation of slavery does not affect the right of action on the bond made *voluntarily* by the obligors.

The repeal of the statute or its expiration, or the abrogation of slavery would only affect the validity of such contracts made subsequently thereto. Authorities above cited and 12 Fla., 9; Art. XV., sec. 3, Con. of Fla., 1868.

The plea since the last continuance and the amendment thereto, plead that the bond *is* (not *was*) contrary to the constitution of the United States and State.

The constitution of the United States does not support the proposition. The 26th sec. of XVI article of the constitution of the State is itself in violation of the constitution of

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the United States. 18 Howard; 16 Howard, 369; 1 Kent, 418, *et seq.*; 3 Story's U. S. Constitution; and conflicts with the 3d sec. of the XV article.

RANDALL, C. J., delivered the opinion of the Court.

Charles Phinney and Robert S. Phinney, plaintiffs in execution, caused a levy to be made upon certain negro slaves alleged to be the property of William H. Garlington, the defendant in execution. The defendant availed himself of the provisions of "an act providing for the stay of executions in this State," approved December 13, 1861, and gave a bond in the sum of \$8000, conditioned for the forthcoming of the property twelve months after peace is made and proclaimed between the Confederate States of America and the United States of America.

In 1867, this action, of debt is brought upon this bond against the principal, Garlington, and the sureties, Jesse Williams and others. The defendants craveoyer of the bonds, which being shown, they interpose eight pleas in bar to the action. The plaintiff demurs to these pleas, and the demurrer is sustained by the court, and the defendants were permitted to file eleven pleas in bar. These pleas are again met by a demurrer, the demurrer is sustained by the court, and a judgment *nil dicit* is entered upon the motion of the plaintiff and a writ of inquiry is awarded returnable to the next term.

At the next term this judgment *nil dicit* is vacated upon defendant's motion and they are permitted to file a plea *puis darrien continuance*, which was demurred to by the plaintiff and the demurrer sustained by the court, when the defendants were again granted leave to file an amended plea.

The plea is as follows:

"The said defendants, Jesse Williams and Pickens Creswell, by Gary their attorney, for amended pleas since the last continuance and for a plea on equitable grounds, say that the said supposed writing obligatory in the plaintiff's declaration

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mentioned, was executed under the provisions of an act of the General Assembly of the State of Florida, styled "an act providing the stay of executions in this State," approved December 13th, A. D. 1861, whilst the said State was in rebellion with the United States, which said act and said writing obligatory are, and have become null and void, and in conflict with, and contrary to the spirit and provisions of the constitution of the United States and of the State of Florida, and this the said defendants are ready to verify."

To this plea there was a demurrer and joinder, and the demurrer was sustained by the court. The plaintiff then moved for a judgment *nil dicit* which was awarded, and the plaintiff's damages being assessed at \$4,608.80, a final judgment for that amount was entered and the defendants now prosecuted a writ of error from this court.

The plaintiff in error insists very properly that this court can consider nothing except the judgment upon the demurrer interposed to the last pleas. The precise question arose in the case of Walker vs. Wills, 5 Ark., 167, and it was there held that "when a demurrer is sustained to a plea and leave is asked and granted to file another, the first plea is abandoned, and the decision on the demurrer cannot be considered here."

In Clearwater vs. Meredith, 1 Wallace, 42, it is held that "where a plaintiff replies to a plea and his replication being demurred to is held to be insufficient, and he files a new replication, he waived the right to question in this court the decision in the court below on the sufficiency of what he had first replied."

As a matter of course the rule applicable to plaintiff's replication is applicable to defendant's pleas, and in this case, after demurrer sustained to his first plea and his filing new pleas, he waived any right he might have had to question the correctness of the decision of the court on the demurrer to the first plea. In like manner he abandoned his second set of pleas when by leave of the court he filed the third,

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and he abandoned the third when he filed the fourth; and the consequence is we can only review the judgment of the court upon the demurrer to the last plea.

Before proceeding to examine the judgment of the court upon the demurrer to the last plea, we deem it proper to make a remark in reference to the exercise of discretion in this case by the court in permitting three new sets of pleas to be filed at the pleasure of the defendant. The plaintiff presumes that the defendant when he files his plea sets up all the defence which he proposes to make, and the court (even if it is admitted that it may permit it at all,) should not permit new and other pleas to be filed after judgment upon demurrer against the defendant, except in a plain case where it is manifest that the justice of the case requires it, and where the court is satisfied that it is not interposed for delay only. When a party has come in and filed his pleas and they are pronounced insufficient upon demurrer, it is not a matter of course that he may plead *de novo* as in this case. It is his duty to set up all his defence at first. If such was not the rule, it is not seen where there could be an end to a suit. The practice of permitting defendants to interpose successive sets of pleas without any control and at their will and pleasure, is in conflict with all proper ideas of practice. This discretion, if it be exercised at all, should be exercised in such manner to teach parties that they must have all their defences in at first, and that it is a serious omission not to do so. The judge should inspect the plea proposed to be filed, and if it is a repetition of a previous plea, or if it is not a good defence, or if the judge thinks it is interposed for delay, or there is any other like good reason, he should refuse leave to file it.

The record discloses that there was no formal judgment entered upon this demurrer, and it contains nothing more than a simple entry endorsed upon the demurrer to the effect that it was sustained. After this there is a final judgment *for want of a plea*. This is incorrect, and this final

judgment must necessarily be reversed. The defendant had not failed for want of a plea. He had in fact filed some twenty pleas, and they were pronounced insufficient upon demurrer. The proper judgment in the case was a final judgment upon the last demurrer.

Setting aside this judgment and indicating to the court below the proper judgment to be given in this case, brings us to the consideration of the last plea.

If it appears by the record that the plaintiff has no cause of action against these defendants, and that the defect is such that no amendment can be made which will cure it, it is immaterial whether the question was raised in the court below or not; the judgment cannot stand.

The first section of the act under which this bond is alleged to have been executed reads as follows: "That there shall be no sales under executions and judgments at common law or decrees in chancery in this State until twelve months after peace is made and proclaimed, or until otherwise provided by law, between the Confederate States of America and the United States of America, except by the consent of the defendant or defendants; provided, nevertheless, that in case of any levies the defendant or defendants, by themselves, their agent, attorney at law, or attorney *de facto*, be required to give bond, with good and sufficient security, (to be approved by the sheriff making said levy,) for the forthcoming of the property on or at the time above specified in this section."

It is urged by the plaintiff in error that the act of the Legislature referred to has become null and void by the adoption of the State Constitution of 1868, but it is deemed unnecessary to resort to the fifteenth article of that Constitution as authority for declaring void *ab initio* a prior act of the Legislature which was inconsistent with the terms or spirit of the Federal Constitution.

But I regard the first section of Article XV of the present State Constitution as embodying a principle of law applica-

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ble to the cases contemplated by it. It reads, "that all ordinances and resolutions heretofore passed by any convention of the people, and all acts and resolutions of the Legislature conflicting or inconsistent with the constitution of the United States and the statutes thereof, and with this constitution, and in derogation of the existence or position of this State as one of the States of the United States of America, are hereby declared null and void and of no effect." Sections two and three of the same article expressly ratify all acts of the Legislature passed during the war, or at any time previous to or since that event, which are not inconsistent with the Constitution of the United States or the State Constitution of 1868. This was doubtless adopted to save the confusion which would follow the holding of all acts of legislative bodies (which bodies might not be considered strictly legal,) to be invalid.

I consider that all acts of any legislative body passed during the period of the supremacy acknowledged by this State of the "Confederate" government, which were adopted in contemplation of such supremacy and in view of the overthrow of the constitution and government of the United States, as utterly void and of no effect, except so far as individual acts under such laws may, perhaps, be excused by reason of the compulsory nature of such legislation and the inability to resist its enforcement. The act in question expressly recognizes the dismemberment of the United States and the establishment of the Confederate States of America. The war, then in its incipiency, is therein recognized as a war between two nations capable of making treaties with each other. The act holds out to the debtor an inducement to aid in prolonging the war as a means of obtaining an extension of credit or a postponement of the time of payment. It holds out to the creditor an inducement to labor in aid of the success of an inchoate power in its war upon the government of the United States, in effect the destruction of that government and the establishment of another in its

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place, in order that the security may become valid and his debt saved.

And though the one may have supposed himself to be beneficially interested in a prolongation of the contest by delaying the day of payment, and the other in hastening the result, and thus a sort of antagonism may have existed between the debtor and creditor, both were induced to oppose the success, either immediate or remote, of the United States government and the supremacy of the constitution of the United States as the national law. Had the Confederate government succeeded in establishing itself, displacing that existing under the constitution of the United States, this statute in question may have been acknowledged as the law and all acts under it have been valid, (unless it be further subject to the objection that it impairs the obligation of contracts;) but with the disasters which put an end to the framework of the Confederacy fell also all statutes, all ordinances and contracts passed or entered into contemplating and depending upon a different result. It may be said that the creditor was not a party to the bond; that the sheriff only was the party protected or saved by it; that the creditor has suffered, and that this is a sufficient consideration on his part, and the delay of payment is a sufficient consideration on the part of the debtor for the enforcement of the bond. However this might have been if the statute were not liable to the denunciation of its nullity, and had it provided merely a stay for a given period, depending upon no such illegal contingency, no consideration can be countenanced which seeks to uphold a contract that in any respect contemplated the destruction of the national life or the national integrity. But the statute being null from the beginning for the reasons stated, no bond or agreement based upon it will be considered valid for the purpose of enforcing it. It is tainted with the illegality of its origin and cannot be enforced in any court bound by a sacred pledge to observe the constitution of the Union. We are obliged to look

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upon this contract from the standpoint of that constitution, and from this aspect we see that the statute and the bond contain elements contravening the spirit of the constitution and antagonistic toward the government of the United States, and hence are void as against public policy, even though they contain other provisions which are not subject to these objections. For it is an acknowledged rule that where an entire agreement contains an element which is legal, and one which is against public policy and therefore void, the legal consideration cannot be separated from that which is illegal so as to found an action upon it. *Ross vs. Truax*, 2 Barb., 361; *Pettit vs. Pettit*, 32 Ala., 288; *Collins vs. Merrell*, 2 Met. Ky., 163; *Valentine vs. Stewart*, 15 Cal., 387; *Gelpeke vs. City of Dubuque*, 1 Wal., 221. The statute being void, the sheriff was not lawfully authorized to take this bond and discharge a levy under execution, nor could the debtor under such circumstances lawfully insist upon the release of his property.

In Alabama, it has been held that an act prohibiting the issue of an execution without the written consent of the defendant, until after the expiration of one year from the ratification of a treaty of peace between the Confederate States and the United States, was void, whether tested by the constitution of the United States or that of the Confederate States. *Ex parte Pollard*, 40 Ala., 77; *Hudspeth vs. Davis*, 41 Ala., 389.

The judgment for want of a plea should be reversed, and the cause remanded with directions to enter final judgment for the defendants upon the demurrer of the plaintiff to the last plea.

WESTCOTT, J., delivered the following concurring opinion:

I fully concur in the decision of the court upon the points of practice presented by the record. I concur also in the judgment pronounced, but I express no opinion upon any other question raised by the record, except the question

whether there has been any breach of the condition of the bond in this case. It appears from the plea that the bond was given under the statute of Dec. 13, 1861, and by reference to this statute we find the condition to be, to produce the property levied upon twelve months after peace was made between the Confederate States and the United States.

It is contended that the language of the statute, and of the bond, should be held to mean "twelve months after the termination of hostilities between the Confederate States and the United States," and that the failure to deliver at that time constituted a breach. The case of *Tucker vs. Maxwell*, 11 Mass., 143, is cited by the appellee as authority to justify such an interpretation. In that case, the owner of a vessel bound on a voyage had drawn an order in plaintiff's favor, payable on the vessel's return, in part payment for the cargo, and the plaintiff had given a receipt in full for the goods sold. It was held, that while upon the order itself no action could be maintained against the drawer except upon the return of the vessel from the voyage, yet that he could recover upon the original demand, as the giving of the receipt was not, in that case, a release, unless there was proof that the plaintiff was to depend, at all events, for payment of the sum on the vessel's return.

This case is, therefore, rather against the position taken by the appellee, the court holding that so far as the order was concerned there could be no recurrence to the drawer except upon the terms of the draft itself, that is, on the return of the vessel from the voyage, and to apply the principle to the case under consideration, there could be no breach of the condition of the bond except upon a failure to produce the property levied upon, in the event stated, which never had happened, and consequently there has never been any breach.

The effect of a somewhat similar instrument was stated in the case of *Palmer vs. Pratt*, 9 Eng. Com. Law, 374. In

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this case a bill was drawn payable thirty days after the arrival of the ship *Paragon* at Calcutta, and the court say, "In the record it appears it was only payable at thirty days after the arrival of the ship *Paragon*, so that if the ship did not arrive the bill would never be paid."

In *Thorington vs. Smyth*, lately decided in the Supreme Court of the United States, Chief Justice Chase, in delivering the opinion of the court, incidentally considered the nature of a somewhat similar instrument. In speaking of Confederate notes he says, in substance, that there could be no payers except in the event of a successful revolution, as upon their face they were made payable only after the ratification of a treaty of peace between the Confederate States and the United States of America. Now, upon the face of this bond there could never be a breach of its condition except in the event of success upon the part of the Confederate States, and a peace made and proclaimed between them and the United States. We are asked to hold that a breach occurs upon the happening of precisely the reverse event, viz: a failure of the Confederate States and the overthrow of its forces. We know of no principle of law which authorizes a court to construe a statute in the light of events happening subsequently to its enactment. The conceived evil, which the statute proposed to remedy, was a sale of property under legal process during war. That such was its purpose is admitted.

The Legislature might readily have enacted a statute framed in such language as to provide for the contingency of failure, or affected by feelings which would not tolerate the idea of failure, and looking only to the event of success, the language of the act could certainly limit the obligation of the sureties to that event alone.

If the Legislature has neglected to provide for the contingency of failure, and expressly required the production of the property only in the event of success, how can we extend the obligation?

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If the Legislature, in providing a remedy for the conceived evil, expressly omits to provide for one of two contingencies, how can we construe the act to embrace both? I conceive that such a contingency as failure, at the time of the passage of the act, was not contemplated by the Legislature, nor it is probable that any of the parties to the bond indulged such an idea at that time.

I know of no authority, nor any principle of law, which would justify us in enlarging the obligation of the sureties upon this bond to the extent desired by the appellee, and I think the judgment of the Circuit Court should be reversed for this reason.

WILLIAM S. BARDIN, APPELLANT, VS. E. M. L'ENGLE, APPELLEE.

1. Where the record contains a declaration in ejectment, a plea of the general issue and a joinder in issue endorsed in short form upon the plea without showing the date upon which the joinder in issue was added, the presumption is that it was in due time.
2. A bill of exceptions should be made up and signed during the term of the court at which the trial is had, unless by special order further time is allowed.

Appeal from the Circuit Court of Duval county.

The case, covering the points decided, is stated in the opinion of the court.

F. I. Wheaton for Appellant.

Sanderson & L'Engle for Appellee.

WESTCOTT, J., delivered the opinion of the court.

This is an appeal from a judgment rendered in an action

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of ejectment in the Circuit Court for Duval county, wherein the appellant was plaintiff and the appellee defendant.

The first error assigned in this case is, "that the court refused a judgment by default for want of a replication, issue not having been joined before the swearing and empaneling of the jury." The record in this case contains a declaration in ejectment, framed under the statute, a plea of the general issue, and a joinder in issue by the plaintiff is endorsed on the plea. This endorsement is without date, and the presumption in the absence of evidence to the contrary is that it was made in time, and in conformity with the rules.

It is true, that the Judge certifies in what purports to be a bill of exceptions, that the plaintiff had not accepted the issue tendered by the plea before the jury were called, and if this statement was properly before us, the question stated in the first assignment of error would be raised; but it appears that the bill of exceptions in this case was signed after the term, and there is no evidence that such time was allowed to make it up and sign it in accordance with the provisions of rule 8, governing the practice in the Circuit Courts in this respect. 6 Fla., 521. The appellee makes this objection to the bill of exceptions, and the rule must be enforced.

The practice which prevails in the Supreme Court of the United States is not to regard such a paper as a bill of exceptions. 4 Pet., 107; 4 How., 4. We cannot therefore regard this statement in the consideration of this subject.

All the other errors assigned involve a consideration of the evidence adduced upon the trial, and in the absence of a bill of exceptions cannot be considered.

We have nothing in the record which occurred upon the trial. No error appears in such portion of the record as is before us, and we cannot do otherwise than affirm the judgment.

The judgment is affirmed.

The State of Florida, ex rel. Cruse vs. Edwards—Opinion of Court.

THE STATE OF FLORIDA, *ex rel.* HARRY CRUSE, vs. CHARLES H. EDWARDS, CLERK OF THE CIRCUIT COURT OF LEON COUNTY.

A witness summoned to testify in behalf of the State before the grand jury, or before the Circuit Court, receives his compensation from the State, and not from the county.

This is an appeal from a judgment of the Circuit Court of Leon county.

The relator was a witness in behalf of the State before the grand jury, and at the trial of a cause in the Circuit Court. He claimed that the fee for his attendance was payable by the county, and filed his petition in the Circuit Court for a mandamus to be addressed to the county clerk, commanding him to draw a warrant in relator's favor for the sum due. After notice, a hearing of the matter of the petition was heard and the mandamus was denied. From this order this appeal is prosecuted.

J. B. C. Drew for Appellant.

Bolling Baker for Appellee.

WESTCOTT, J., delivered the opinion of the court.

The question involved in this case is whether a witness, in behalf of the State before the grand jury, as well as before the Circuit Court, is to be paid by the county. There is nothing in the constitution which regulates or controls the subject. The service performed enures as well to the benefit of the county as the State, and whether compensation is to be made by the county or the State is in the discretion of the legislative department of the government. The second and third sections of chapter 867 of the laws of Florida directs their payment by the State. It is therefore not a charge against the county.

The order of the Circuit Court is to this effect, and it is therefore affirmed with costs.

Pearce vs. Thackeray and Thackeray—Opinion of Court.

EDMUND A. PEARCE, SURVIVING PARTNER OF THE LATE FIRM OF E. A. PEARCE & SON, APPELLANT, VS. RICHARD THACKERAY AND POLLY THACKERAY, APPELLEES.

1. The Circuit Court, independent of express legislation, has the power to re-establish a judgment roll or entry when the original record is lost or destroyed.
2. The proper way to proceed is to show by affidavit what the lost record contained, and by motion after personal notice of the intention to move the Court. The notice must be sufficiently explicit to advise the opposite party of what is intended, as well as to enable him to controvert the affidavits.
3. After an appearance and argument of the motion upon the merits, any irregularity in the service of the notice is cured.

This is an appeal from a final order rendered in the Circuit Court for Escambia county.

The opinion contains a full statement of the case.

C. W. Jones for Appellant.

Mallory & Maxwell for Appellees.

WESTCOTT, J., delivered the opinion of the court.

This is an appeal from proceedings had in the first judicial circuit in Santa Rosa county, in which the court passed an order re-establishing a judgment roll and *fiat* issued thereon, which it was alleged had been destroyed by fire.

The plaintiffs in the court below (appellees here,) during term entered a motion "to establish the record and papers, and also the execution with its endorsements, in the case of Richard Thackeray and Polly Thackeray vs. Edmund A. Pearce, surviving partner, &c." With this motion they placed upon the files what purported to be true copies of the originals, which they alleged had been destroyed by fire,

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There appears in the record a paper signed by plaintiffs' counsel, giving notice to defendant of the particular record which they would move to establish and of the day upon which they would bring the motion to the attention of the court, and upon this paper is endorsed a service upon the defendant by the sheriff of Escambia county, the proceeding having been instituted in Santa Rosa county, but the defendant being a resident of Escambia.

On the 23d of October, the day named for the hearing of the motion in the notice, an order was passed re-establishing the record.

From this order an appeal is now prosecuted to this court, and a reversal is prayed upon two grounds.

First. That the proceedings were had without legal and sufficient notice to the defendant in the case in which the judgment was rendered and the execution was issued.

Second. Because no proof of the destruction of the record was made.

Before examining these questions, we will remark that no point is made in this case involving the question whether this was such proceeding as could be made the subject of appeal. In this case this question makes no difference, as our conclusion would be the same in either event. The power of the court to establish this judgment roll and *fi. fa.* is not questioned, and it could not well be doubted, as it is an admitted and frequently exercised power both in the courts in England and the United States.

An examination of the authorities will show, however, that the precise method of procedure is not well settled in the United States.

In Alabama, the practice is to show by affidavit what the record contained, after personal notice of the intention to move the court, and it is required that the notice should be sufficiently explicit to advise the opposite party of what is intended and such as will enable him to controvert the affidavits submitted in support of the motion.

Pearce vs. Thackeray and Thackeray—Opinion of Court.

In other States, a somewhat different practice has prevailed.

This court, in *Rhodes vs. Moseley*, (6 Fla., 12,) intimates that the application should be by petition, with notice to the adverse party; but no question as to the form of proceeding was raised in that case, the proceeding there being instituted by the sheriff, who used the name of the plaintiff in execution, and the court set aside the proceeding on the ground that the sheriff could not institute such a proceeding, the action of the court below having been at his instance.

The method adopted in the case now before the court was by motion of the plaintiffs in execution, with notice to the defendant in execution, and is a substantial compliance with the practice in Alabama, where the subject underwent considerable investigation. We think this practice correct, and that it is attended with all the safeguards necessary to the due administration of justice in this respect. The practice in England is upon motion and rule to show cause. 2 Strange, 833.

The objection on the ground of a want of notice cannot be sustained in this case, even admitting that notice was necessary and it was not given. The record discloses that the defendant in execution appeared and opposed the motion upon the merits, one of the grounds upon which he opposed it being that there was no sufficient proof of destruction of the judgment roll and *fi. fa.* This being so, it is too late to except to the proceedings on account of a want of sufficient notice. The purpose of notice and of process issued upon the institution of a suit is to give the court jurisdiction of the person, and to enable the party to be heard in respect to the subject matter involved in the particular controversy; and if he appears and is heard upon the merits, as in this case, the object of the service is accomplished and its regularity becomes immaterial. Where there is an irregularity in the service and the defendant appears without taking the exception, it cures the defect.

The remaining ground upon which a reversal of the order is sought is, because no proof of the destruction of the record was made. It sufficiently appears from the record in this case that this position was taken in the court below, that it was overruled and that an exception to the ruling of the court in reference thereto was noted; but there is no portion of the testimony in reference to the destruction of the judgment roll, or in reference to any other matter of evidence used upon the hearing of the motion, before this court.

The bill of exceptions in the record is nothing more than a simple statement of the grounds upon which the motion was opposed, the ruling of the court and the exception of the party to the ruling. It is plain that we cannot disturb the order upon this account, without having the necessary facts before us to review the action of the court in reference to them. Without the facts, we have nothing but the order of the court, and we cannot presume that it is wrong.

The order of the court below is affirmed.

NOTE.—Authorities as to power of the court: 2 Burr, 722; 1 Strange, 141; 2 Strange, 833, 1077, 1264; 1 Caines, 496; 8 Ala., 298.

Effect of general appearance: 3 Cranch, 496; 4 Cranch, 421; 13 How., 150; 8 Wheat., 699; Pet. C. C., 489.

JACOB BRILLIS *et al.*, PLAINTIFF IN ERROR, vs. ISADORE BLUMENTHAL, DEFENDANT IN ERROR.

The Circuit Court has by the Constitution final appellate jurisdiction in all civil cases arising in the County Court, in which the amount in controversy is \$100 and upwards; and a writ of error to the Circuit Court brought for the purpose of bringing the judgment of that Court affirm-

Brillis et al. vs. Blumenthal—Opinion of Court.

ing the judgment of the County Court in the case specified before the Supreme Court for review, is unauthorized, and must be dismissed for want of jurisdiction.

Error to the Circuit Court for Nassau County.

The defendant in error moved to dismiss the writ of error for want of jurisdiction.

C. P. Cooper for the motion.

Finley and Dawkins contra.

RANDALL, C. J., delivered the opinion of the court.

This cause originated in the county court of Nassau county. An action of assumpsit was commenced by writ of attachment by the defendant in error against J. W. Peacock. The sheriff attached a bale of cotton as the property of the defendant, Peacock, and the plaintiffs in error interposed a claim of property in the cotton under the statute. Upon the trial of this claim a verdict was rendered against the plaintiffs in error, and judgment entered thereon, from which they appealed to the Circuit Court, where the judgment of the county court was affirmed. They now seek to bring the cause before this court by a writ of error, which has been served and to which a return has been filed.

The defendant in error moves to dismiss the writ of error.

The Constitution, article VI, sec. 8, gives to the Circuit Court "*final* appellate jurisdiction in all civil causes arising in the county court in which the amount in controversy is one hundred dollars and upwards." The judgment in the attachment suit was nearly three hundred dollars, but the value of the cotton levied upon and claimed is not stated.

We consider that the case presented in the record is one in which the judgment of the Circuit Court is final, and that this court has no jurisdiction of the cause. For this reason the writ of error is dismissed.

Penny vs. Holmes—Opinion of Court.

WILLIAM PENNY, APPELLANT, vs. N. H. HOLMES, AP-
PELLEE.

Where the judgment of the Circuit Court is based upon a consideration of all of the testimony adduced, and none of the testimony is properly brought before this Court, the judgment must be affirmed.

This is an appeal from a judgment of the Circuit Court in Escambia County, rendered in an action of replevin instituted by Penny against Holmes. There was a judgment for defendant, from which the plaintiff appealed. The error assigned in this case required a consideration of the testimony in order to its determination, and there was no bill of exceptions in the record. The case is decided solely upon this point.

C. W. Jones for Appellant.

Mallory & Maxwell for Appellee.

WESTCOTT, J., delivered the opinion of the court.

This is an appeal from a judgment in an action of replevin instituted in Escambia county.

The case both as to the law and the facts was submitted to the court, and after due consideration of the same, judgment was rendered for the defendant, (the appellee here,) in the court below.

The evidence submitted to the court is not before us. There is no bill of exceptions in the record. We have nothing but the judgment of the court before us, and we cannot presume that it is wrong.

We deem it unnecessary to discuss the effect of the constitutional requirement directing that the evidence shall be reduced to writing by the clerk under the control of the court and filed with the papers in the case, as this matter has been decided at this term after mature consideration, our conclusion being that this section does not dispense with the necessity of a bill of exceptions.

The judgment is affirmed.

Parsons and Hoeg vs. Baxter—Opinion of Court.

AMANDA PARSONS AND HALSTED H. HOEG, APPELLANTS,
VS. MARTHA B. BAXTER, APPELLEE.

Where the bill of exceptions contains none of the evidence, nor an indication of the state of the facts upon which the Circuit Judge was asked to charge, nor any part of the charge of the Court, the judgment appealed from being conformable to the pleadings, no error is apparent in the record and the judgment must be affirmed.

Appeal from the Circuit Court for Duval County.

F. I. Wheaton and *B. B. Andrews* for Appellants.

Sanderson and *L'Engle* for Appellee.

RANDALL, C. J., delivered the opinion of the court.

Assumpsit commenced in Duval Circuit Court by Martha B. Baxter, appellee, against appellants, and judgment rendered against them Nov. 29th, 1869, for \$1,772.53.

There is no assignment of errors filed in this case, as required by the rules.

The error mentioned in the brief is that "the court refused to charge the jury touching the remission of interest during the absence of the plaintiff from the country and the absence of the instrument sued on, the plaintiff having no authorized agent here to receive payment, as asked for by counsel for defendants."

The bill of exceptions contains none of the evidence whatever, nor any indication of the state of the facts upon which the court was asked to charge, nor does it contain any part of the charge of the court. The judgment is conformable the declaration in the suit, and as there is nothing before us showing whether an error was committed or not, the presumption is there was none.

There being no error apparent in the record, the judgment is affirmed.

Mountain vs. Roche—Statement of Case.

**MILES MOUNTAIN, APPELLANT, vs. STEPHEN J. ROCHE,
APPELLEE.**

1. Unless the record discloses so much of the proceedings as will show that an error was committed by the Court below upon the trial, it must be intended that the proceedings in that Court were correct.
2. The "act for the relief of occupying claimants," approved January 12, 1848, has no application to proceedings under the act relating to forcible entry and detainer.

Appeal from the Circuit Court for Washington county.

This was a proceeding instituted before the Circuit Court for the county of Washington by the respondent, for the unlawful withholding from him by the appellant, without the consent of the respondent, of certain land in that county, praying restitution of possession and damages. The proceeding was commenced in 1869, under the act of 1868, entitled "an act concerning forcible entry and detainer." Verdict and judgment were rendered in favor of the complainant and the defendant appeals.

The return consists of the complaint, summons, memorandum of trial by jury, and their verdict, and a judgment in favor of the respondent for the recovery of the possession of the premises. There are also incorporated in the return memoranda, purporting to be testimony or deposition, and also copies of deeds which the clerk certifies were "given in evidence" on the trial.

The bill of exceptions, entire, is as follows:

"Now on this day came the defendant by his counsel and moved the court for a new trial in the above cause on the following grounds, to-wit:

"1. That the verdict of the jury was contrary to the evidence.

"2. That the verdict of the jury was contrary to law.

"3. That the verdict of the jury was contrary to the charge of the court.

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"4. That the charge of the court was contrary to law.

"Which motion the court overruled, and the defendant, by his counsel, excepted and asked the court to sign his bill of exceptions.

"Now on this day came the defendant by his counsel and moved the court to summon twelve disinterested persons to act as jurors, and assess the damages and waste committed, and the value of rent after judgment, and the value of the improvements made by said defendant on said land.

"Which motion the court overruled, to which ruling the defendant, by his counsel, excepted and asked the court to sign this, his bill of exceptions.

HOMER G. PLANTZ, Judge."

The assignment of errors is as follows:

"I. The court erred in overruling the defendant's motion for a new trial.

"II. In having admitted evidence of right of property in complainant, viz: the sheriff's deed to him.

"III. The court erred in overruling the defendant's motion to summon twelve disinterested persons to act as jurors and assess the damages and waste committed, &c."

A. L. Woodward, Sr., and D. L. McKinnon, for Appellant.

C. C. Yonge for Appellee.

RANDALL, C. J., delivered the opinion of the court.

We are unable to determine from this record whether the court erred in overruling the motion for a new trial, or upon what the ruling of the court was based, for the bill of exceptions does not disclose the testimony given on the trial, nor what charge or instructions were given to the jury by the court, nor that any objections or exceptions were made or taken during the trial by either party. Even the memoranda of testimony and the certificates upon the copies of

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the deeds do not show which party offered or used the supposed testimony or deeds.

This court has so frequently ruled that unless the record disclose so much of the proceedings as will show that an error was committed by the Circuit Court upon the trial, it must be intended that the ruling was correct, that it is unnecessary to repeat any discussion of the question. We discover that the verdict was in accordance with the complaint, and conformable to the statute, and we have not properly before this court anything, to inform us what intermediate proceedings were had.

In the case of Robinson vs. L'Engle, decided at the present term, it was held that the minutes of testimony kept by the clerk in pursuance of the constitution were not a part of the record, so far as to dispense with the necessity of incorporating the testimony in a bill of exceptions in order to bring it before this court for view.

The first and second points in the assignment of errors are, therefore, not sustained by the record.

As to the third point, that the court overruled the defendant's motion to summon a jury of twelve persons to assess the damages, waste, &c., we do not consider that the proceeding contemplated is applicable to a case of this character. It was stated in the argument that the motion was made under the provisions of "an act for the relief of occupying claimants," passed January 12, 1849. This act provides "that if any person or persons hath or have settled or improved, or shall hereafter settle or improve any lands in this State, supposing them his own by reason of a *title* in law or equity," * * * * "but which lands shall prove to *belong* to another, the charge and value of such settling and improving, to be ascertained in the manner hereinafter mentioned, shall be paid by the right owner, to such settler, improver, or his assignee or occupant so claiming."

The act further provides that the court rendering judgment eviction, or if in equity, rendering a decision against

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the occupant where suit has been brought by a party claiming a right to land in possession of another claiming the same under title as aforesaid, shall cause to be summoned twelve persons to act as jurors, "to make assessments of damages and waste committed, and of rents and profits accruing after judgment or decree rendered of the value of the improvements, and the land from which the occupant is to be evicted," &c., all of which they are to report to the court for such further action as is provided in the act.

If this were a case to which this act is applicable, it might be a question whether the bill of exceptions does not come short of showing a state of facts entitling the appellant to a jury to make the inquest contemplated by the act. But we conceive that the proceeding, under the unlawful detainer act, does not involve the title of either party, or determine any right except that of the present possession. The act of 1848 contemplates a proceeding in which the conflicting titles of the respective parties shall be finally determined by the judgment or decree of a competent court. The present case is not one in which the lands, of which one party supposed himself to have a title in law or in equity, have been adjudged to belong to the other as a "right owner," and therefore the appellant was not entitled to require the assessment of damages, value of improvements, &c., and the ruling of the court was therefore proper.

There being no error apparent in the record, the judgment of the Circuit Court must be affirmed.

Chambers vs. Savage and Haile—Opinion of Court.

WILLIAM E. CHAMBERS, APPELLANT, vs. GEORGE SAVAGE
AND EDWARD HAILE, APPELLEES.

When, before the adoption of the Code of Procedure, a cause was referred by the Circuit Court to a practicing attorney as referee, in pursuance of the 17th section of Art. VI of the Constitution, to be tried and determined by him; and upon a hearing of the cause upon the law and facts he made his decision and filed the same, with a record of his proceedings, in the office of the clerk of the Circuit Court in vacation, such decision does not become a final judgment of the Court without further action of the Court thereon, and an appeal cannot be taken from the decision of the referee to the Supreme Court as from a final judgment.

Appeal from the Circuit Court for Alachua county.

The matters decided are fully stated in the opinion of the court.

Finley & Finley for Appellant.

J. B. Dawkins for Appellees.

RANDALL, C. J., delivered the opinion of the court.

This is a suit commenced by appellant against appellees, in case, for the recovery of damages sustained by the appellant in consequence of the violation, by appellees, of instructions given them by appellant in relation to the sale of cotton delivered to them as factors and commission merchants.

The cause being at issue upon the facts pleaded, the parties, on the 5th day of April, 1870, entered into a stipulation to refer the cause to a referee "to take testimony and adjudicate and adjust the matters in dispute in the cause," under the constitution and laws of this State, out of term time; and that upon the filing with the clerk of the decision of the referee, said decision shall be entered as a judgment and execution issue thereon, subject to the right of appeal given

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by law; and that the court shall fix the compensation of the referee, to be taxed as costs against the losing party.

On the next day the court made an order that the cause be referred, under the constitution and laws, to a practicing attorney as referee, "with full power and authority to exercise all the authority given or intended to be given by the constitution and laws to such referee in subpoenaing witnesses and enforcing their attendance, and in receiving and ordering to be opened written depositions, and to adjudicate all questions of law and matters of fact coming before him in said cause, including postponements or continuances of said references."

The referee, after a hearing upon the testimony adduced, adjudged that the defendants were guilty, in manner and form, &c., "and that said plaintiff do recover of said defendants his damages, costs and charges in this behalf expended. Therefore, it is ordered and adjudged by said referee that the plaintiff do have and recover of the said defendants the just and full sum of three hundred and fifty dollars for his damages, and the further sum of one hundred and ninety-five dollars fees and costs of this suit, and that said defendant be in mercy," &c.

This, (together with memoranda of the testimony and proceedings,) was filed in the office of said court on the 14th June, 1870. A motion was then made before the referee, by the plaintiff, in arrest of judgment and for a new trial, which motion was heard and denied by the referee, and the plaintiff gave notice of appeal "from the final decision of the referee to the Supreme Court," and the cause is upon the docket upon a certified copy of these proceedings.

It is manifest that an appeal will lie to this court, in a suit at law, only from a final judgment of the Circuit Court, and the question presents itself whether this is a "final judgment." This report or finding of the referee has not received the sanction of the Circuit Court, nor has it been the subject of any action of that court, but is treated by the

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appellant as a final judgment of the court, upon which execution may issue. The common legal idea of a "judgment" is, that it is the sentence or doom of the law pronounced by the judge of some court. This is the substance of the definition found in Bl. Comm. and in the Institutes.

The constitutional provision, under which it is supposed this cause was referred for trial, is as follows: "Any civil cause may be tried before a practicing attorney as referee, upon the application of the parties and on order from the court in whose jurisdiction the case may be, authorizing such trial and appointing such referee. Such referee shall keep a complete record of the case, including the evidence taken, and such record shall be filed with the papers in the case in the office of the clerk, and such cause shall be subject to an appeal in the manner prescribed by law." Art. VI, sec. 17.

The statute provides that if a party in the Circuit Court shall feel aggrieved by a final judgment, sentence or decree pronounced by said court, he may take his appeal to the Supreme Court. Th. Dig., 446.

The clause of the constitution relating to trials before referees, as we have seen, says that "*such cause* shall be subject to an appeal in the manner prescribed by law." If the decision of the referee is in substance and effect a final judgment, then an appeal may be taken from it without any further proceeding on the part of the Circuit Court.

If the provision "authorizing such trial" may be properly interpreted to include the rendering of final judgments and decrees in "civil causes," it follows that *any cause* at law or in equity may be finally determined by the referee without any legislation regulating the proceeding, and the decision may stand as a judgment or decree of record in the Circuit Court, and is entirely beyond the control of the court appointing the referee, even though the referee may have transgressed the boundaries of the power intrusted to him by the court.

Suits for divorce from the bond of matrimony, for the

Chambers vs. Savage and Haile—Opinion of Court.

foreclosure of mortgages, for enforcing the performance of contracts, for the recovery of real estate and the like, equally with suits to recover upon promises to pay money, are "civil causes" which may be *tried* before a referee. It is probable, or even possible, that it was intended by this brief section of the constitution that a cause, once referred, is forever beyond the control of the court, and that the jurisdiction thereof is thus transferred to and fixed in a practicing attorney? Or may the referee, to be appointed, be more properly deemed an officer or agent of the court, like the office of a master in chancery, or an arbitrator, (as provided by former statutes,) whose report, decision or award is subject to the final order of the court before it shall become irreversible, except by means of an appeal to the Supreme Court?

Let it be supposed that the referee in this cause had filed a statement to the effect that he had heard the proofs of the parties, and that his decision in the case was that there was "due to the plaintiff the sum of three hundred and fifty dollars for the cause of action stated in the declaration."

This is all that he may be required to do by any law in existence. He has tried, heard and decided the matters in issue, and filed the papers with the clerk. Grant that an appeal may be taken, and that upon the appeal this court finds no error in the conclusions of the referee, and sends the case back with a judgment of affirmance. Is the decision of the referee a judgment, and if so, of what court? Is an execution to issue upon this award, without an adjudication of *some* tribunal authorized to pronounce and enforce judgment? What of the costs, and who shall determine the amount of costs to which the plaintiff is entitled, and how shall the costs get into the judgment? The clerk, in vacation, is nowhere authorized to enter judgments. Is the decision of the referee a lien upon real property? By what authority? There is no provision of law declaring that the determination of such a referee shall be deemed a judgment

Barkley vs. Russ—Statement of Case.

of the Circuit Court, and in the absence of such legislation we are unwilling to so consider it.

The report of a referee may more properly be deemed a finding upon the law and facts submitted to him, for the information of the court appointing him; and upon such report the court may properly act as upon the verdict of a jury, or an award of arbitrators, and pronounce judgment; or upon a review of the proceedings set aside or modify it, or order a re-trial, as the law of the case may seem to require.

Taking this view of the matter, it is considered that there is not such a judgment in this case as can be "subject to appeal in the manner prescribed by law," and therefore this appeal should be dismissed.

These suggestions have no reference to the provisions of the "Code of Procedure," this cause having been referred and a hearing had before the code took effect.

BOLYN B. BARKLEY, APPELLANT, VS. JOSEPH T. RUSS,
RESPONDENT.

A decision of the Circuit Court overruling a demurrer in an "action for the recovery of money only," is not such an "order, decision, or judgment," as authorizes an appeal before final judgment under section 10 of the Code of Procedure.

Appeal from the Circuit Court for Jackson county.

The declaration was upon a promissory note and upon the common counts.

The defendant pleaded: 1. The general issue. 2. That the note was made during the late war, and that the currency contemplated in its payment was Confederate or State Treasury notes. 3. That the note was illegal and void because it was given in consideration of treasury notes of the so-called Confederate States and of this State, the latter redeemable in bonds and notes of the Confederate States, &c.

Barkley vs. Russ—Opinion of Court.

The plaintiff joined issue upon the first and second pleas, and filed a special replication to the third plea.

The replication was demurred to.

The court overruled the demurrer; and from this decision the appeal was taken. The issues of fact upon the first two pleas were not tried or disposed of. In this court the respondent moved to dismiss the appeal.

G. S. Hawkins for the motion.

J. F. McClellan contra.

RANDALL, C. J., delivered the opinion of the Court.

This motion involves an examination of the provisions of the Code of Procedure governing appeals. This appeal is taken from the decision of the judge overruling the defendant's demurrer. The declaration is upon a promissory note and the common counts on promises, and the action is therefore brought "for the recovery of money only." In the language of the Code, sec. 10, appeals may be taken in the following cases:

1. From a judgment in an action or proceeding determined in the Circuit Court, and upon the appeal to review any intermediate order involving the merits, and necessarily affecting the rights of the parties.

Section 193, defines a "judgment" thus: "A judgment is the final determination of the rights of the parties in the action."

The decision or order overruling the demurrer in this case is not such a judgment. In addition to the fact that there were issues of fact not tried or disposed of appearing in this record, there is no final judgment, even if there had been no such issues. As was said by Denio, C. J., in *Adams vs. Fox*, 27 N. Y., 640, the determination of the demurrer no doubt *entitled* the plaintiff to judgment, unless the defendant should amend, but until final judgment was entered, the case was not in a condition to be reviewed on appeal.

Barkley vs. Russ—Opinion of Court.

2. An appeal may be taken from any order, decision or judgment in actions *other* than for the recovery of money only, &c. Of course, the appeal is not under this clause, because this is not such "other" action.

3. An appeal may be taken from a final order affecting a substantial right in a "special proceeding." This being an "action" as defined by section 2 of the Code, is not a "special proceeding," it being an ordinary proceeding in a court of justice for the enforcement of a right. This appeal was not therefore taken under the third subdivision of sec. 10.

4. An appeal will lie whenever the decision of a motion involves the constitutionality of any law of this State, &c.

The decision upon a demurrer is not the decision of a motion. A *motion* is defined by section 333 to be "an application for an order," which is certainly not the functions of a demurrer to a pleading.

The decision of the issue of law upon a demurrer is in the nature of an interlocutory order, upon which a final judgment will follow unless the demurrant plead over. Should he do this, however, he will waive or abandon the demurrer, and cannot afterwards take advantage of the error, if there be one, in overruling the demurrer. If advantage is desired to be taken of this decision upon the demurrer, the party will permit the decision to stand until the other issues are disposed of, and final judgment is entered.

I speak of the action of the court upon the demurrer as a "decision," and this term as used in section 10 of the Code, I understand to refer to the word in the sense in which it is used in section 213, to-wit: "Upon a trial of an issue of law, the *decision* shall be made in writing, stating the conclusions of law; such decision shall be filed with the clerk within twenty days after the court at which the trial took place. *Judgment upon the decision shall be entered accordingly.*"

Appeal dismissed.

Anderson vs. The Presbyterian Church—Opinion of Court.

**DANIEL G. ANDERSON, APPELLANT, VS. THE PRESBYTERIAN
CHURCH OF GAINESVILLE, APPELLEE.**

1. An appeal in a common law case lies only after final judgment, and that final judgment must appear in the record otherwise than by a mere recitation of the fact in the bill of exceptions.
2. Where the plaintiff asks and voluntarily submits to a non-suit, no appeal lies at his instance to this Court. A court of review will not in such case on appeal reverse the judgment of non-suit, nor will it look into other questions presented by the bill of exceptions.

This is an appeal from a judgment rendered in the Circuit Court for Alachua county in an action of assumpsit, wherein Daniel G. Anderson was plaintiff, and the Presbyterian Church of Gainesville was defendant. The record contained no final judgment. It was apparent from the bill of exceptions that the plaintiff had taken a non-suit in the case.

S. Y. Finley for Appellant.

J. B. Dawkins for Appellee.

WESTCOTT, J., delivered the opinion of the court.

This is an appeal from the fifth circuit. The case was heard in Alachua county.

There were judgments of the court upon demurrers of the plaintiff and defendant respectively. After this, amendments were permitted and the parties went to the jury. The plaintiff, after having offered certain evidence to sustain the issues joined upon his part, saw proper to take a non-suit. Such was the final disposition of the case as it appears from a statement in the bill of exceptions. This judgment is properly no part of the bill of exceptions, and a mere recitation of the fact in the bill of exceptions that such a judgment was rendered cannot cure the want of the judgment in the record.

An appeal in a common law case lies only after final judg-

Hall et al. vs. Penny—Syllabus.

ment, (5 Fla., 407,) and as in this case the record does not disclose a final judgment, the appeal must be dismissed. This defect might be remedied by the court directing *sua sponte* a certiorari to bring up the judgment of non-suit, but we deem it unnecessary.

We cannot perceive how, when this judgment is entered upon the motion of the plaintiff, an appeal lies from it to this court. The taking of a non-suit was a matter within the discretion of the plaintiff under the rules. It involved at the hands of the court no exercise of judicial judgment upon any matter of law involved in the case, and was a judgment rendered independent of the facts or law of the case. If the plaintiff wished to avail himself of any of his objections to the rulings of the court as to the admissibility of testimony, or to its charge, he should take exceptions and proceed with his cause before the jury. He cannot avail himself of his bill of exceptions or of other errors in the record to reverse the judgment of non-suit, which was the necessary consequence of his own acts. 18 Wend., 172.

The appeal is dismissed with costs.

JAMES W. HALL *et al.*, APPELLANTS, VS. WILLIAM PENNY,
APPELLEE.

1. An appeal is not "obtained" until all the requirements of the statute necessary to make it effectual are complied with; and in cases at law, the giving and approving of a bond is one of the pre-requisites. Thomp. Dig., 446.
2. All the steps necessary to perfect an appeal, if the appeal be applied for during a term of the Circuit Court, must be taken during the term; and if the appeal be applied for in vacation, all the requirements of law must be complied with within ten days after the close of the term, otherwise an appeal is not "obtained" within the meaning of the statute.

Hall et al. vs. Penny—Opinion of Court.

Appeal from the Circuit Court for Escambia county.

Judgment having been rendered against the appellants, who were plaintiffs in the Circuit Court, and a motion for a new trial having been made by them, which motion was denied on the 4th day of October, A. D. 1869, the plaintiffs, on the 9th day of October, prayed an appeal, which was granted. On the same day, the said Circuit Court was adjourned for the term. On the 4th day of November the appeal bond was approved by the Judge and filed.

The respondent now moves that the said appeal be dismissed, because the said bond was not approved and filed in the time required by law.

C. W. Jones for the motion.

C. C. Yonge contra.

RANDALL, C. J., delivered the opinion of the court.

The statute of Feb'y 10, 1832, Th. Dig., 446, provides that if either party shall feel aggrieved by a final judgment, it shall be lawful for such party, during the session of the court at which the judgment is pronounced, or within ten days thereafter, to *obtain* in court, if the appeal be made in term time, or in the clerk's office if it be in vacation, his appeal to the Supreme Court, and an appeal obtained shall in all cases operate as a *supersedeas*. The party appealing shall give bond. If the said appeal be applied for in term time, the application shall be made in open court, and so stated by the clerk upon the record, and the bond shall be approved by the Judge; if the appeal be applied for in vacation, the bond shall be approved by the clerk.

The act of Feb'y 12, 1836, declares that no appeal or writ of error shall be granted to an original plaintiff unless said plaintiff shall first pay the costs, and also give the required bond.

In the case of the Union Bank vs. McBride, 2 Fla., 7, the

court unanimously say, after quoting the statute of 1836, that "the payment of all costs below, and entering into bond, as in the act prescribed, seem to be steps precedent to granting a writ of error, imperatively required by the statute. Any other construction of it would, we think, be repugnant to the act and an evasion of it, and in some measure render it inoperative." In that case, as in the present, the plaintiff in error was the plaintiff below.

This proceeding by appeal is a statutory substitute for a writ of error, and like other statutory remedies, the law creating or prescribing it must be strictly complied with. This has been the uniform rule in this State as elsewhere.

An appeal is not "obtained" until all the requirements of the statute necessary to make it effectual are complied with, and, in cases at law, the giving and approving of a bond is one of these prerequisites.

All the steps necessary to perfect an appeal, if the appeal be applied for during a term of the Circuit Court, must be taken during the term; and if the appeal be applied for in vacation, all the requirements of law must be complied with within ten days after the close of the term.

The statute does not provide any mode of supplying, after the expiration of the time limited, an omission of anything necessary to perfect an appeal and make it effectual, and the courts are not authorized to enlarge the statute or dispense with a compliance with it.

In the present case, the plaintiff below prayed an appeal in term time, and it was "granted" by the court, but the bond was not approved and filed until some twenty-six days after the close of the term.

The appeal must therefore be dismissed with costs.

Standley vs. Jaffray & Co.—Opinion of Court.

PENELOPE L. STANDLEY, PLAINTIFF IN ERROR, VS. E. S.
JAFFRAY & CO., DEFENDANTS IN ERROR.

All the persons named as plaintiffs or defendants in a joint judgment, must join in prosecuting a writ of error, but if some refuse the others may prosecute it in the names of all without their consent.

Error to the Circuit Court of Alachua county.

The defendants in error moved to dismiss the writ of error in this case upon the grounds stated in the opinion of the court.

J. P. Sanderson for the motion.

J. J. Finley contra.

RANDALL, C. J., delivered the opinion of the court.

In this case a judgment was rendered, (if there is indeed a judgment apparent in the record,) in favor of E. S. Jaffray and others against Penelope L. Standley and Joseph M. Arnow, jointly, and a writ of error was issued at the instance of Penelope L. Standley alone.

A motion to dismiss the writ of error is made by the defendants in error, upon several grounds, the most important one being that "the judgment is a joint judgment against Standley and Arnow, and the writ of error is sued out by only one of the defendants, and there is nothing to show that the other had notice and refused to join."

The writ of error must be dismissed upon this ground. All the authorities relating to the practice in England and in this country show that the rule is imperative, that all the persons named as plaintiffs or defendants in a joint judgment must join in prosecuting a writ of error, or if but one of them prosecuted it, he must do it in the names of all or with proper notice to them and severance, and he may use the name of a co-defendant without his consent.

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There is nothing in the statute authorizing a new or different practice. If a writ of error could be prosecuted by each person against whom a joint judgment may have been rendered, there might be as many writs of error as there were persons named in the suit. This would lead to great complication and delay. The law, as settled, is based upon sound reason and policy. The proper practice, where one of several persons refuse to join in the writ, is pointed out in the books. The ground of the motion in this case is sustained in *Hardwick*, 135-6; 3 *Burr.*, 1789; 1 *Wilson*, 88; 2 *T. R.*, 738; 2 *Bac. Abr.*, 461; 11 *Wheat.*, 414; 7 *Peters*, 399; 5 *Ala.*, 117; 1 *Ala.*, 27, 183, 275; 1 *Porter*, 277; 4 *S. & M.*, 732; 8 *John.*, 565; 9 *Cow.*, 307; 1 *S. & Por.*, 253. Writ of error dismissed.

WILLIAM G. ZINN, *et al.*, APPELLANTS, VS. LOUIS DZIALYNSKI, RESPONDENT.

1. An affidavit made for the purpose of procuring an attachment against the property of a debtor, stated that "the defendant is justly indebted to the plaintiffs in the sum of \$1,829.95, which amount is now actually due; and that the affiant has reason to believe that the defendant will fraudulently part with his property before judgment can be recovered against him." The defendant, traversing this affidavit for the purpose of moving to dissolve the attachment, says that the affidavit made in behalf of the plaintiffs "is untrue, wherein it alleges that the defendant is indebted to the plaintiffs in the sum of \$1,829.95, and that the same is actually due; and that said affidavit is untrue wherein it alleges that the affiant has reason to believe that the defendant will fraudulently part with his property before judgment can be recovered against him." On trial of this issue before a jury, the Court charged that "the plaintiff must prove the amount named in the affidavit, \$1,829.95, is actually due, and that he had reason to believe the defendant would fraudulently part with his property before judgment can be recovered against him." *Held*: That the words "actually due" referred to the question whether

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the amount of indebtedness had actually become due and payable at the time, and not to the precise amount of the indebtedness; and if it was proved that the amount actually due was less than the amount stated, but sufficient to give the Court jurisdiction, this is substantial affirmative proof of that branch of the issue, and the charge was too strict.

2. When an agent of the plaintiffs made an affidavit for the purpose of procuring a writ of attachment, and upon a traverse of the affidavit it was shown, and not denied, that the statement of the amount due was based upon the admission of the defendant to the agent, the defendant is estopped from insisting upon a motion to dissolve the writ of attachment, that a sum less than that so admitted and stated in the affidavit was actually due.
3. The act of Dec. 20, 1859, amending the attachment laws, provides that the applicant shall make oath that the amount of the debt or sum demanded is actually due, and that he has reason to believe that the defendant will fraudulently part with his property before judgment can be recovered against him. Upon a motion to dissolve an attachment issued under this provision, the issue to be tried is not confined within the spirit of the law to facts which had come to the knowledge of the affiant. The object of the law was to give a remedy when there was in fact reason to believe that the defendant would fraudulently part with his property within the time specified.

This is an appeal from a judgment of the Circuit Court of Duval county.

The plaintiffs, William G. Zinn, Herman D. Aldrich, Jr., John H. Bradley, Thomas W. Darling and John S. Aldrich, by their agent J. A. Lee, made and filed an affidavit, stating that "the defendant is justly indebted to plaintiffs in the sum of one thousand eight hundred and twenty-nine 95-100 dollars, which amount is now actually due; and that he has reason to believe that the said Louis Dzialynski will fraudulently part with his property before judgment can be recovered against him." Upon which affidavit a writ of attachment was issued. The defendant traversed this affidavit, and says that "the affidavit made and filed by J. A. Lee, agent for the plaintiffs, is untrue, wherein it alleges that the defendant is indebted to the plaintiffs in the sum of \$1,829.95, and that the same is actually due; and that the said

affidavit is also untrue wherein it alleges that the said J. A. Lee has reason to believe that the defendant will fraudulently part with his property before judgment can be recovered against him."

A jury was called to try the issues, and on hearing the testimony of the parties, and the charge of the court, a verdict was rendered against the plaintiffs, whereupon the writ of attachment was dissolved.

The charge of the court to the jury was as follows: "In this case the plaintiffs must prove the amount named in the affidavit, \$1,829.95, is actually due; and that he has reason to believe the defendant will fraudulently part with his property before judgment can be recovered against him. Fraud is never presumed, but must be proven."

To the first paragraph of the charge, that the plaintiffs must prove that the sum of \$1,829.95 is actually due, the plaintiffs' counsel excepted. The evidence discloses that the indebtedness claimed was upon two promissory notes, dated at New York, for \$911.35 and \$860.96, payable at Jacksonville, and an open account of about \$200, and interest, with a credit of \$200 paid. The amount of \$1,829.95, as computed by the affiant Lee, agent of plaintiffs, was made up by including about fifteen dollars of interest, accrued at the time he presented the claim to defendant, and which he says the defendant acknowledged to be correct, and adding interest thereon up to the time of commencing suit, being some three or four months. The amount actually due, as shown by the evidence, interest on the notes being computed at 8 per cent., (Florida rate,) and on the account at 7 per cent., (New York rate,) was \$1,823.67. The defendant testified that he had paid some money and sold some good to one Mr. Moseley, plaintiffs' agent, on account of plaintiffs, amounting to about \$45, which deducted from plaintiff's demand as proved, shows the balance actually due \$1,778.67, being \$51.28 less than the amount stated in the affidavit. From the order dissolving the attachment this appeal is presented.

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Bisbee and Archibald for Appellants.

Sanderson & L'Engle for Respondent.



RANDALL, C. J., delivered the opinion of the court.

The law under which this writ was issued was the act of December 20, 1859. It required the affiant to state "that the amount of the debt or sum demanded is actually due."

The charge of the court required the jury to find that not less than the precise amount named in the affidavit was actually due. We cannot agree to this construction of the law. It is required, of course, that the indebtedness must be actually due, that is, that the day of payment had arrived according to the contract, but it is not required by the spirit of the law that if, by an error of the agent in making a computation upon a statement admitted by the defendant to be correct, it should appear that there were a few dollars or a few cents more or less actually due than was stated in the affidavit, the plaintiffs should fail though the grounds upon which the attachment was obtained might be amply proved.

If the amount sworn to be due is sufficient to give the court jurisdiction of the subject matter, and the other grounds for issuing the writ are sufficient to meet the requirements of the law, the writ should not be discharged unless the discrepancy between the amount claimed and the amount proved is so material as to warrant the imputation of fraud or bad faith on the part of the plaintiffs.

The respondent urges that a plaintiff might, for a debt of one dollar, attach property worth one thousand dollars, and thus work great loss and damage to a defendant. This is quite true, and the plaintiff might also be thereby guilty of perjury, in addition to fixing himself and sureties in the attachment bond for all the actual damages sustained. The bond required is deemed ample security for all the damages which a defendant "may sustain in consequence of improp-

erly suing out said attachment." The defendant in his testimony does not deny what the plaintiffs' witness, Lee, states in his testimony, that he admitted to Lee that the amount of the account presented to him, and upon which the witness computed the interest on commencing the suit, was due, nor does he pretend that he then claimed to offset the amount which he testifies he paid Mr. Mosely in the previous autumn. He is therefore estopped from insisting upon this reduction of the amount due, as a ground for quashing the attachment.

Upon this branch of the case, therefore, we are of opinion that the charge of the court was erroneous.

The residue of the charge is not excepted to. The question raised by the issue covered by the latter portion of the charge was, whether there was at the time of taking out the attachment reason to believe that the defendant would fraudulently part with his property before judgment could be recovered against him. The issue is not confined to facts which came to the knowledge of the affiant.

Such was not the purpose of the law. The object of the law is to give a remedy when there is in fact reason to believe that there would be a fraudulent parting with the property within the time specified. The old statute required a positive oath. The statute of 1859 modified this so as to enable the party to obtain an attachment without having to take an oath absolute in its character. A man could not well swear positively that a defendant would fraudulently part with his property within a given time, and conscientious men would hesitate before taking such an oath, while he might very properly swear that he had reason to believe it. The purpose of the statute was to correct this evil; but it was not its purpose to restrict the evidence going to show facts within the affiant's knowledge.

Several questions arose during the progress of the trial upon the materiality of testimony offered by the respective

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parties and received or rejected. As to the ruling of the court in rejecting testimony offered, we do not think it would have materially affected the case if the ruling had been otherwise; and as to the proof admitted against objections, although some of it did not concern the issue, it was not of such a character as to have necessarily affected the verdict under the charge of the court. It is sufficient to suggest that the evidence should be confined to the issue presented by the opposing affidavits under the law.

It was suggested upon the hearing that the testimony and proceedings before the jury were not before this court, because, what purported to be a bill of exceptions, was not such, as it was not signed by the judge. The original bill of exceptions, however, sent up under the order of the circuit judge, is properly signed.

The judgment of the Circuit Court is reversed, and the cause remanded for further proceedings according to law.

JOHN DOE, *ex dem.* ALEXANDER MAGRUDER AND WILLIAM LOGAN, VS. RICHARD ROE, WITH NOTICE TO CHARLES PERPALL.

1. A deed of conveyance of lands, executed by a person out of possession, is void as against a party holding adverse possession.
2. A defendant in ejectment may show twenty years' possession by himself and those under whom he holds, adverse to the possession of the plaintiff and those under whom he claims; and if the plaintiff has not been prevented from prosecuting his claim within the twenty years by reason of some legal disability, he cannot recover.
3. A deed of conveyance executed by the Trustees of the Internal Improvement Fund does not carry with it a presumption that the title was in them and that they could lawfully convey the premises. Their title is not original, and, like that of any other party, should be proved, and is subject to be overcome by a superior title.

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4. The volumes of "American State Papers," published under the authority of Congress, containing copies and translations of the original grants or concessions of lands by the Spanish government, are as valid evidence in the investigation of claims to lands in courts of justice as though they were authenticated in any other mode recognized by law.
5. A copy of a document or record, duly certified by the officer legally in possession of the original, is lawful evidence, on general principles, equally with the original.
6. The grants or concessions of lands made by the Spanish government, anterior to the treaty of cession whereby Florida was annexed to the United States, are deemed to have been ratified and confirmed by the eighth section of the treaty, without further action by Congress.
7. When a bill of exceptions is signed by the judge, it will be presumed that it was signed within the time prescribed by law, unless there is in the record some evidence to the contrary.

Error to the Circuit Court for Duval county.

Ejectment for lands in St. Johns county, tried in Duval county. Under consent rule, the plea of defendant, Per-pall, put in issue the title to the lands mentioned in the declaration.

On the part of the plaintiffs, Magruder and Logan, there was offered in evidence a deed of bargain and sale executed by the Trustees of the Internal Improvement Fund, created under "an act to provide for and encourage a liberal system of Internal Improvements in this State," approved January 6, 1855, for a portion of the lands mentioned in the declaration, to Alexander Magruder and William Logan, dated March 11th, 1867. The defendant, by his counsel, objected to the reading of the deed in evidence upon the ground that the deed is void for want of seizin, unless connected with some possession of the lands described. The judge overruled the objection and permitted the deed to be read in evidence, and the defendant excepted. Other similar deeds of the said trustees to other parties, covering other of the premises mentioned in the declaration, together with conveyances by the grantees named therein to the said Magruder and Logan, were severally offered by the plaintiffs in evidence and permitted to be read against similar objections

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on the part of the defendant. The defendant, Perpall, admitted that he was in possession of the premises at the date of the commencement of this suit, and the plaintiff rested his case.

The defendant, to maintain the issue on his part, claimed title under the 8th section of the treaty with Spain of Feb'y 22, 1819, (ceding Florida to the United States,) to which he called the attention of the court, and offered in evidence a portion of Vol. 4, "American State Papers," Duff Green's edition, relating to public lands in Florida, purporting to be a translation of the Spanish grant or concession to Jesse Fish of the lands in controversy; the act of giving possession, payment of purchase money, &c., together with the report and decision of the U. S. Commissioners declaring it to be a valid title and recommending its confirmation by Congress. This was objected to by plaintiffs' counsel, and the court sustained the objection.

Counsel for defendant then placed Mr. Venancio Sanchez upon the stand, who was sworn, and for the purpose of proving the tenancy and possession of defendant was asked the question, "who was in actual possession of these lands at the time of the commencement of this suit?" This question was objected to by plaintiffs and the objection sustained.

The counsel for defendant then offered a certified copy, under the seal of "the keeper of the public archives," of the Spanish title or grant to Jesse Fish, (a copy of which is given in the bill of exceptions,) and proved the handwriting of the said "keeper of the public archives," and that he was such keeper at the date of the certificate. The counsel for plaintiffs objected to the introduction of said certified copy, and the objection was sustained and the evidence refused.

Counsel for defendant then offered in evidence the original of the Spanish concession and act of delivery to Jesse Fish, together with a certificate of the government notary, and also the testimony of Rafael Alvarez, Spanish consular

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agent at Jacksonville, to prove that the document offered in evidence was in conformity to Spanish laws and customs, who testified that he was familiar with the laws and customs of Spain regulating the transfer of real property; that he became familiar with those laws and customs when he sold some property in Cuba; that he did not know that the same regulations governing the sale of property in Cuba were the same as those which regulated the sale of property in Florida when it was a Spanish province.

The court decided that the witness was not an expert and ruled out his testimony.

The plaintiffs' counsel objected to the reception of the documents offered, and the court sustained the objection and decided that the testimony was inadmissible.

Counsel for defendant offered to prove fifty years actual possession under chain of title prior to the date of the deeds under which plaintiffs claim title. The court ruled that such evidence was inadmissible and refused the testimony, to all which rulings the defendant's counsel excepted.

Counsel for defendant asked the court to charge the jury: "That to entitle the plaintiffs to a verdict they must prove that they had the right of entry as well as the legal estate in the premises at the time of the demise laid in the declaration," which instruction the court gave, with the modification: "right of entry follows legal title;" to which modification the defendant excepted.

After the jury had retired, they desired to be informed "if the title given by the Trustees of the Internal Improvement Fund to the plaintiffs in this suit is a legal title, and if so, if it sets aside actual possession to the parties now in possession." The jury coming into the court room, upon the invitation of the judge, he instructed them as follows: "If it was not a legal title, the court would have excluded it. Unless the evidence shows a better title than mere actual possession in the defendant, then you must find for the plaintiffs." Defendant excepted to this charge.

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The jury found for the plaintiffs, and judgment was entered accordingly, from which the defendant appeals and assigns the following errors in the proceedings in the Circuit Court:

First. The court erred in overruling the objections made by defendant to the introduction as evidence, on the part of the plaintiff, of the deed from David S. Walker and others, Trustees of the Internal Improvement Fund of the State of Florida, to Alexander Magruder and William Logan, dated March 11th, 1867, and in permitting to be read in evidence, against the objections of defendant, the deed from the said Trustees of the Internal Improvement Fund to Albert D. Rogero, dated 25th September, 1867; also the deed from same parties (the trustees aforesaid) to Charles F. Hopkins and Albert D. Rogero, dated 24th June, 1867; also in permitting to be read in evidence, against same objections upon the part of defendant, certified copy of deed from Charles F. Hopkins and Albert D. Rogero to Alexander Magruder and William Logan, dated 23d October, 1867, and certified copy of deed from Albert D. Rogero to Alexander Magruder and William Logan, dated 23d October, 1867.

Second. The court erred in ruling out and refusing to permit the defendant to offer or read in evidence, in support of his title, such portions of Vol. 4, American State Papers, (Duff Green's edition,) as related to public lands in Florida and purported to be a translation of the Spanish grant or concession to Jesse Fish, the act of giving possession, payment of purchase money, &c., together with decree of the United States Commissioners declaring it a valid title and recommending it to Congress for confirmation.

Third. The court erred in sustaining the objection of plaintiffs to the question asked by defendant of Mr. Venancio Sanchez as to who was in actual possession of the lands at the time of the commencement of this suit, &c.

Fourth. The court erred in ruling out and refusing to permit to be offered or read in evidence the copies of Span-

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ish documents in the bill of exceptions set forth and which were certified to by Antonio Alvarez, K. P. A.

Fifth. The court erred in ruling out and refusing to permit to be read in evidence, on the part of defendant, the original copy of the Spanish concession and act of delivering to Jesse Fish, in the bill of exceptions mentioned, &c., and in sustaining the objections made by plaintiffs to the introduction thereof, &c.

Sixth. The court erred in refusing to permit defendant to prove fifty years actual possession under chain of title prior to the date of the deeds under which plaintiffs claimed title.

Seventh. The court erred in refusing to give the instructions asked for by defendant's counsel, and in modifying said instructions and giving them in a modified form.

Eighth. The court erred in answering the communication sent by the foreman of the jury and by writing the jury to come in to be instructed on the point raised by them, as set forth in the bill of exceptions.

Ninth. The court erred in the instructions given to the jury.

M. D. Papy for Appellant.

Sanderson & L'Engle for Appellees.

RANDALL, C. J., delivered the opinion of the court.

The first error assigned is that the court admitted, on the part of the plaintiff, the introduction of the deed of the Trustees of the Internal Improvement Fund to the lessors of the plaintiff and to Charles F. Hopkins and Albert D. Rogero, and the deeds of Hopkins and Rogero to the lessors, against the objections of the defendant. And in support of this assignment it is contended that a conveyance by a person out of possession, where the land is held adversely to the grantor, is void, and that to enable a party to convey the lands he must first reduce the lands to possession.

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This objection is not to the order in which the plaintiffs sought to introduce their evidence, but to the evidence itself. This was the first evidence offered by the plaintiffs, and the nature of the defendant's title or possession was not yet apparent. For aught that appeared, these deeds may have been proper and necessary links in the chain of title by means of which the plaintiffs' lessors, with other necessary proofs, might have shown themselves to be the owners in fee, and that their right of possession was superior to that of the defendant. It had not yet appeared that the defendant was in possession of the premises previous to the execution of the deeds offered. It is considered, therefore, that the question was prematurely raised by the defendant, and that there was no valid objection to the proofs thus offered.

It may, however, be remarked that whenever evidence of this character is tendered, out of its regular order, in the attempt to establish a title by proof of mesne conveyances, it is at least proper that the offer be accompanied by a proposition to connect the deeds so offered, by means of further proofs, with further legal evidence of title. And the court should exercise great care, lest upon a partial or incomplete showing of title the jury shall be allowed to consider the evidence as complete, while important links in the chain of title are absent.

The second error assigned relates to the refusal of the court to permit the defendant to read in evidence, in support of his title, such portions of Vol. 4 of the American State Papers (Duff Green's edition,) relating to public lands in Florida and purporting to be a translation of the Spanish grant or concession to Jesse Fish, the act of giving possession, payment of purchase money, &c., together with the decree of the U. S. Commissioners declaring it to be valid and recommending it to Congress for confirmation.

In *Radcliffe vs. The United States Ins. Co.*, 7 Johns., 38, it was held that copies of public documents, transmitted to Congress by the President and printed by the printer to

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Congress, may be used as evidence without further authentication. "A greater strictness of proof, (the court remarks,) in respect to such public matters of state, and when introduced collaterally and not as matter of fact in issue, would be inconvenient, and is not now in practice required."

The printed journals of Congress have been allowed to be read in Pennsylvania, without other proof of their authenticity. Whart. Dig., 280, 2d ed. In a later case before the Supreme Court of the United States. (Bryan vs. Forsyth, 19 Howard, cited by appellant's counsel,) the court remarks: "These State Papers were published by order of Congress, and selected and edited by the Secretary of the Senate and Clerk of the House of Representatives. They contain copies of legislative and executive documents, and are as valid evidence as the originals are from which they were copied. The competency of these documents as evidence in the investigation of claims to lands in the courts of justice has not been controverted for twenty years, and is not open to controversy."

It is understood that the edition called Duff Green's edition of American State Papers was printed by authority of one of the houses of Congress, and was the copy referred to by the court in the case just cited. Other editions have since been printed under similar supervision and authority, and are equally receivable as *prima facie* evidence of the contents of the original on file in the archives of the government as though they were authenticated in any other manner recognized by law.

The third error assigned is that the court sustained the objection of the plaintiffs to the question of defendant's counsel as to who was in actual possession of the lands at the time of the commencement of this suit.

It cannot be disputed that a possessory title, (actual possession,) is good until overcome by a better right. Hence, the question was pertinent and proper. In the action of ejectment there is one principle which must ever be recog-

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nized, namely: that the plaintiff cannot recover but upon the strength of his own title, and cannot, of course, found his claim upon the weakness of the defendant's. And possession gives the defendant a right against every man who cannot show a good title. The party, therefore, who would change the possession, must first establish a legal title to it. *Runnington on Eject.*, 15; 4 *Burr*, 2487. The evidence on the part of the plaintiff must be such as will establish his right of possession as against that of the party in possession. A mere deed of conveyance from a stranger is not good against a party holding adversely at the time of its execution, and such deed, unaccompanied by further evidence to show that the party in possession holds in subordination to such grantor, would not establish a right as against him. Such conveyance, unless made prior to, or otherwise consistent with the possession of the defendant at the time of its execution, is void as against him. Hence, the rejection by the court of the evidence of the defendant's possession was, in effect, a pre-judgment of the plaintiff's case, and a denial of the right of the defendant to overcome it.

The fourth error assigned is, that the court ruled out and refused to permit to be offered or read in evidence the copies of the Spanish documents, set forth in the bill of exceptions and which were certified to by the keeper of the Spanish archives.

The objection to these documents was general, and we presume went only to the form in which they were presented. If so, we can see no reason for refusing them. In the case of the *U. S. vs. Percheman*, 7 *Peters*, 85, the court says: "Whether the acts (of Congress referred to,) be or be not construed to authorize the admission of the copies offered in this cause, we think that on general principles of law a copy given by a public officer, whose duty it is to keep the original, ought to be received in evidence."

The fifth error assigned is, that the court erred in ruling out, and refusing to permit to be read in evidence, on the

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part of the defendant, the original copy of the Spanish concession and act of delivery to Jesse Fish, in the bill of exceptions mentioned, and in sustaining the objection made by the plaintiffs to the introduction thereof, &c.

The reason of the court for excluding the original grant of the lands in question, which assuredly was an important step in the attempt of the defendant to establish a title, doubtless was, that it did not appear that the witness offered, for the purpose of showing that the document was executed according to the laws of Spain, had sufficient knowledge of those laws to make him a competent witness to prove them. If this was the ground, the ruling of the court was doubtless correct. The usual course is to make such proof by the testimony of competent witnesses, who are skilled or well acquainted with the law to be proved; or by certificates of persons high in authority; or by an authenticated or sworn copy, if the law is a written law; or by public history or public documents of the country. Story's Conflict of Laws, 530; 5 Yerger, 398.

There should undoubtedly be some proof of the genuineness of the original grant, and this may be made by the ordinary mode of making such proof, or by showing that the grant has been recognized as valid by the government of this country, through officers appointed to inquire into and determine the matter, or by the high departments of the government.

The grants or concessions of lands made by the Spanish government, anterior to the treaty of cession, whereby Florida was annexed to the United States, are deemed by the Supreme Court of the U. S. to have been ratified and confirmed by the eighth section of the treaty, without farther action by Congress. And the Supreme Court of this State held to the same effect in *McGee and others vs. Doe, ex dem. Alba*, 9 Fla., 382.

The sixth error assigned is, that the court refused to permit defendant to prove fifty years actual possession under

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chain of title, prior to the date of the deed under which plaintiffs claim title. The court ruled that such evidence was inadmissible, and refused it.

By the statute of limitations of 21 Jac. 1, Ch. 16, "none shall make entry into land but within twenty years after their right or title shall first descend or accrue." Therefore, where there hath been no possession for twenty years, either in the lessor, or the plaintiff, or his ancestors, the plaintiff in ejectment will be non-suited. 1 Burr., 119. And twenty years adverse possession is not only a negative bar to the action or remedy of the plaintiff, but takes away his right of possession, and gives a positive title to the defendant, for the plaintiff must show a right of possession as well as property, and therefore the defendant need not plead the statute of limitations as in other cases. Runn. on Eject., 58; 1 Burr., 119. In the case of Taylor ex dem. Atkyns vs. Horde, 1 Burr., 126, the court of King's Bench determined for the plaintiff upon the *right*, but against him upon the *remedy*, being of opinion that he was barred of that by the statute of limitations, on which judgment he brought a writ of error to the House of Lords, who determined the latter point first and separately, and holding the plaintiff to be barred of his remedy by ejectment, affirmed the judgment without entering into the point of right.

The statute applies to all persons capable of a right to enter, and, therefore, if it appears that there has been a possession by the defendant, or those under whom he holds, for the last twenty years, adverse to the title of the claimant, and that the claimant has not been prevented from prosecuting his claim earlier by reason of some of the disabilities allowed by the statute, (as minors, &c.,) he will be barred of his remedy by ejectment. Adam's on Eject., 46, and n.; ib., 77.

In Sanches & Wife vs. Gonzales, 11 Martin, 207, it was held that "a person put in possession by the Spanish government by metes and bounds of a part of the King's land,

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as her own, acquired such title, which, strengthened by long possession, must prevail."

The doctrine of the English law above indicated prevails in the United States generally, qualified in some of the States by the condition that a possession, to be adverse to the true owner, must be under *color* and *claim* of title, and this we understand to be the proffered case of the defendant here. In either aspect, the defendant was entitled to the benefit of the evidence offered, and the ruling of the court was erroneous.

Seventh assignment. The court erred in refusing to give the instruction asked for by the defendant's counsel and in modifying said instructions and giving them in a modified form. The instruction prayed was that "to enable the plaintiffs to recover they must prove that they had the right of entry as well as the legal title," &c., which the court modified by adding, "Right of entry follows legal title." We have already seen that this is not the law. This would abrogate the statute of limitations, and upset the logic of all the courts in England and America. Even a tenant would have no rights which his landlord would be bound to regard, and the doctrine of adverse possession would be practically extinguished.

The eighth error assigned relates to the instruction of the court in response to the inquiry of the jury, whether the title given by the Trustees of the Internal Improvement Fund to the plaintiff was a legal title, and if it "sets aside actual possession" of the parties now in possession. The court said to them, "If it was not a legal title the court would have excluded it. Unless the evidence shows a better title than mere actual possession in the defendant, then you must find for the plaintiff." We have already remarked upon this subject generally in considering the third proposition. The paper title contained in the deeds of the trustees and their grantees, and the actual possession of the defendant, constitute the whole of the plaintiff's case. It was in-

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cumbent upon the plaintiff to show actual possession by himself or his grantors prior to that of the defendant, or that the possession of the defendant was subordinate to the right of the plaintiff. A grantee, whose grantor had neither title nor possession when he conveyed, cannot maintain ejectment against a tenant in possession, for the title of the plaintiff must be shown to be superior to that of the defendant. There was no attempt here to show that the plaintiff's grantors had a shadow of title or possession, but on the contrary, the plaintiff shows that the defendant's title was superior to his own, that of actual possession.

The ruling of the court throughout the whole case must have been based upon the hypothesis that a conveyance by the Trustees of the Internal Improvement Fund authorized the presumption that they had title to the land conveyed, that such title was original like unto the original title in the government paramount to all other, and that there could be neither prescription nor adverse possession as against the government or sovereign; and even granting this position, it was due to the defendant that he might be permitted to show an anterior grant from the sovereign under which he might claim not only the possession, but the title itself. It is not always necessary to trace a title to its original source, but only that the plaintiff shall exhibit so much as will put the defendant to the support of his possession by a title superior to naked possession. *Hartley vs. Ferrell*, 9 Fla., 374. The presumption that the title of the Trustees was original is unwarranted. They derived their title, if at all, from the State, and the State derived its title from the United States. There is nothing in the nature of the title of the Trustees which should preclude the defendant from showing a superior title.

The respondent's counsel upon the argument of this case did not attempt to discuss the merits of the questions raised by assignment of errors, but insisted that the record did not show affirmatively that the bill of exceptions was signed by

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the judge during the trial, or that the time for preparing the same was extended. The rules required that bills of exception should be made up and signed during the term of the court at which a trial was had, unless by special order further time was allowed. We find nothing in this record, however, to warrant the presumption that the bill of exceptions was signed after the expiration of the term. The fact that it was signed raises the presumption that it was properly signed, and unless something appears to negative such presumption, it must be held to have been rightfully done. *Summerlin vs. Tyler*, 6 Fla., 718.

The judgment must be reversed and the cause remanded for such further proceedings as may be had according to law.

JOHN O. MATTHEWS, SHERIFF, &C., APPELLANT, VS. LLOYD
W. WILLIAMS, RESPONDENT.

1. A Sheriff was required by a rule of court to report what action had been taken under an execution, and reported on oath that he had sold property of the defendant in judgment and execution, (who was an administratrix,) and had realized a sum of money from said sale, but that he had, before sale of the property, been notified of the fact that the administratrix had filed notice of the insolvency of the estate in the Probate Court, and that such notice of insolvency was on file in the records of said Probate Court; whereupon on the motion of the attorney of the plaintiffs in the judgment and execution, the court ordered the Sheriff to pay over to the said attorney the money realized on said execution from such sale, or stand committed as for contempt, and the Sheriff paid over said moneys under the order. *Held*: That the return of the Sheriff that a suggestion of the insolvency of said estate had been duly made and filed in the Probate Court, tendered an issue to the rule, and the peremptory order to pay over the money to the attorney without inquiring into the truth of the return was an error, and if such suggestion of insolvency had in fact been filed by the administratrix, it was unlaw-

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ful to direct the Sheriff to pay the money to the attorney, as the money represented assets of the insolvent estate and should be distributed *pro rata* in the settlement.

2. When money has been thus paid over, and the order is reversed or set aside, the court should require the money to be restored, and is clothed with power to enforce restitution by summary process.

Appeal from an order of the Circuit Court for Marion County.

The Sheriff, appellant, was required by a rule in open court to report what action had been taken by him upon an execution issued upon a judgment rendered in favor of Lloyd W. Williams against Sarah M. Pearson, administratrix of the estate of John W. Pearson. The sheriff in obedience to the rule makes report to the court that he had collected the sum of \$324.14 proceeds of sale of lands of the estate of John W. Pearson, levied upon by an execution in favor of Lloyd W. Williams, and another execution in favor of Newell Harmon and McDonald against the same party, and that a balance of the proceeds of sale under said executions remained unpaid. The sheriff further reports on oath that before said sale a written suggestion of insolvency of said estate had been filed by the administratrix in the Court of Probate, of which he had been duly notified, and that the suggestion of insolvency was then of record in said Probate Court. Whereupon the court ordered the sheriff, (appellant,) to pay over instantan to E. M. L'Engle, attorney for plaintiff in execution, the moneys admitted to have been collected. On the next day, the court being informed that the money had not been paid over, the court ordered the sheriff to pay the money to the attorney or he should be committed for contempt. The respondent announced his intention to appeal from said order, and asked for a day's delay, that he might perfect an appeal, which being denied, the sheriff paid over the money as directed.

A farther report having been ordered, the sheriff informed the court that a further sum had been realized upon the sale.

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but that payment had been made by draft and that the money had not been paid thereon; whereupon, on the motion of the said attorney, the court made an order directing the sheriff immediately to pay over to said attorney the further sum of \$381.04.

From these several orders, the sheriff prosecutes this appeal,

S. M. G. Gary for Appellant.

E. M. L'Engle for Appellee.

RANDALL, C. J., delivered the opinion of the court.

A plaintiff in execution may, after money has been made upon it, recover it of the sheriff by a summary application to the court, or by action. Tidd's Pr., 933; 1 Archbold's Pr., 263, and authorities cited. And in New York the sheriff was held bound to pay over the money to the plaintiff without a previous demand upon him, or to have paid it into court, and the court granted a rule that the sheriff forthwith pay over to the plaintiff the amount levied on the execution, together with costs of the application, or that an attachment issue against him. Brewster vs. Van Ness, 18 Johns., 133; see also Pitman's case, 1 Curtis, 186. By the statute of this State, (Th. Dig., 355,) executions were returnable when satisfied, and it was the duty of the sheriff to collect the amount of the writ by the next term of the court; and on the first day of every succeeding term, after receiving the writ, he is required to make a return of his doings thereon, and to pay over to the plaintiff's attorney all moneys collected. *Ib.*, 359. If the sheriff neglect to comply with the law in this respect, he may be required to do so by rule, and the necessary process to compel compliance with the rule. This power is inherent in courts of record. The statute of 1833, (Th. Dig., 358,) referred to by counsel, furnishes an auxiliary process for recovering the money from the sheriff

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with twenty per cent. damages, and for this purpose ten days' notice is required to be given before making the motion. This statute does not apply to the present case. Had the sheriff merely returned that he had made the amount of money, or sold property for a certain sum, the order of the court in the premises would not have been irregular. But the sheriff made report on oath, in answer to the rule, that not only his predecessor in office, but himself also had been served with notice, that the proper suggestion had been made in the Probate Court of the insolvency of the estate of Pearson, while holding the executions, and before the sale; and he offered to pay over the amount realized to the Probate Court, or into the Circuit Court, subject to the legal rights of all persons interested.

The act of January 8, 1853, entitled "an act to provide for the payment *pro rata* of the debts of insolvent estates," requires the Judge of Probate, on the suggestion of insolvency, and a schedule of the assets of said estate being duly filed, "to make distribution of the estate among the creditors, *pro rata*." Whether the sheriff ought to have proceeded to a sale, after notice of the filing of the suggestion of insolvency of the estate, is not the question before this court. That he did so, without question or objection from any party interested as a creditor or otherwise, is probable, and the fund arising from the sale, standing in the place of the property sold, represented a part of the assets of the estate, and the estate being insolvent, these assets became subject to distribution, *pro rata*, among the creditors. The answer to the rule that a suggestion of insolvency had been filed according to law, tendered an issue under the rule which it then became the duty of the court to inquire into, and if the return had been found to be true, other parties beside the plaintiffs in execution would appear to be interested in the fund, and it should have been secured for distribution among the creditors according to law. There can be no shadow of warrant or authority for directing the assets of an

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insolvent estate to be handed over to one or more creditors to the exclusion of all others.

In *Camp. vs. McCormick*,¹ Denio, 641, a motion was made, on behalf of the plaintiff that a sheriff pay over to him money levied upon execution. The sheriff answered that a part of the proceeds of the sale had been paid to one Halsey, who, as landlord, had given notice claiming rent to be due him from the defendant for the premises upon which the property was taken, the landlord claiming a lien thereon for the rent. The proofs in the matter were contradictory, and left it in doubt whether the money was properly paid to the landlord, and the court, because of the doubt, denied the application for summary process, and left the plaintiff to his action against the sheriff. The right of the plaintiffs to the entire fund should be unquestionable to justify this summary proceeding. The answer of the sheriff in this case shows that his motive in withholding the money from the plaintiffs was far from being an intention to disregard his duty, or to act in contempt of the process of the Circuit Court.

The several orders of the Circuit Court, directing the sheriff to pay over to the attorney of the plaintiffs in the said writs of execution, must be reversed and set aside, and the moneys paid to the attorney under said orders must be restored.

If a judgment be reversed in error, the party shall be restored to all he has lost. Comyn's Dig. VI, 469. And the mode of proceeding to effect this object must be regulated according to circumstances. Sometimes it is done by a writ of restitution, without a *scire facias*, when the record shows the money has been paid, and there is a certainty as to what has been lost. In other cases, a *scire facias* may be necessary to ascertain what is to be restored. *The Bank of the U. S. vs. The Bank of Washington*, 6 Peters, 8. Where judgment is set aside after execution levied, and paid, for irregularity, there needs no *scire facias* for restitution, but

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an attachment shall be granted upon the rule for contempt, if there be not a restriction. Per Holt, C. J., 2 Salkeld, 588; Tidd's Pr., 936.

It is therefore considered and adjudged that the several rules and orders of the Circuit Court for the county of Marion, requiring the appellant, the sheriff of said county of Marion, to pay over to the attorney of the plaintiffs in the several writs of execution issued upon the judgments of said court, in the suit of Lloyd W. Williams against Sarah M. Pearson, administratrix of the estate of John W. Pearson, deceased, and in the suit of Newell Harmon & McDonald against the said Sarah M. Pearson, administratrix of the estate of John W. Pearson, deceased, the moneys collected by said sheriff upon said executions, which said orders are dated respectively March 25, 1870, and April 2, 1870, be and the same are hereby reversed and set aside. And it is further ordered that this cause be remanded to the said Circuit Court of Marion county, and said court is directed, by means of its proper rules and process, to cause to be restored to the said appellant, sheriff as aforesaid, all moneys which were caused to be paid by him to the attorney of the plaintiffs in the said judgments and writs of execution, by means of the said rules and orders above reversed and set aside; and that the appellant have and recover against the respondent his costs and disbursements by him expended in and about the prosecution of this appeal, to be taxed by the clerk of this court.

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JAMES W. HALL AND LUCIUS M. MERRITT, PARTNERS, AS J.
W. HALL & CO., APPELLANTS, VS. WILLIAM PENNY, AP-
PELLEE.

Unliquidated damages resulting from a tort cannot be made available as a set off in an action of assumpsit; nor is evidence of such a tort admissible under a plea of set-off of moneys had and received, or moneys due for goods sold and delivered.

Writ of error to the Circuit Court for Escambia County.

J. W. Hall & Co. brought an action of assumpsit against William Penny. The declaration contains but one count, which is for goods sold and delivered. The defendant pleaded the general issue, and a set-off of moneys due for goods sold and delivered, and for money had and received by plaintiff for the use of defendant. By consent a jury was waived and the case submitted to the court.

Under the plea of set-off, defendant introduced evidence of an agreement between himself and plaintiff to the effect that plaintiff agreed to ship a cargo of lumber to St. Marys, Texas, and to sell it there on his (defendant's) account; that instead of making the shipment to St. Marys as he was directed, or as he agreed to do, he shipped to Indianola, Texas.

It appears that the net proceeds of the sale of the cargo of lumber at Indianola was the sum of two hundred and three dollars and ninety cents, while the defendant testified that the value of the lumber at Pensacola, the point of original shipment, and the place of residence of the plaintiffs for business purposes, was some eight hundred dollars. The court in its finding and assessment of damages awarded to defendant the value at Pensacola, and allowed this as a set-off to the claims.

The court found for the defendant in the sum of seven hundred and fifty-eight dollars and sixty-nine cents. There was a motion for a new trial by plaintiff, which being denied, a judgment was entered for the sum mentioned. To that

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judgment this writ of error is prosecuted, and the error here assigned is the overruling of that motion.

The grounds upon which the motion was based in the Circuit Court were—

First—Because the finding of the court was contrary to the evidence.

Second—Because it was contrary to the law.

Third—On the ground of newly discovered evidence.

Fourth—Because the plaintiff was taken by surprise in the introduction of evidence which he could not anticipate, and which he is prepared conclusively to refute.

C. C. Yonge for Plaintiff in Error.

C. W. Jones for Defendant in Error.

WESTCOTT, J., delivered the opinion of the court.

Defendant could have been entitled to set-off the amount allowed by the court in this case only upon one hypothesis, viz: That plaintiff's conduct was of such character as gave him a right of action in which the measure of his damage was the value of this lumber at Pensacola. If defendant has any right of action in this matter, his remedy is either an action on the case for a wrongful sale or trover for a conversion. This is not the proper subject matter of a set-off, and the evidence to establish the tort was inadmissible under a plea of set-off of money had and received, or moneys due for goods sold and delivered. In this action defendant may have waived the tort, and under his plea of set-off for moneys had and received he may have perhaps been entitled to set-off the proceeds of sale at Indianola. 2 Greenlf. Ev., 117, 120; 5 Pick., 285; 10 Pick., 161; 3 Gray, 260; 7 Cush., 442; 5 Met., 73. This sum he might have recovered in an action of assumpsit, and we can see no reason why he may not have pleaded it as a set-off. If he does not desire to accept this sale as the measure of his damage, then he must

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bring such independent action as he thinks appropriate. Had this case actually gone to a jury, the court must have so instructed them as to the law. A verdict of the jury corresponding with the conclusion of the court as to the damages, must have been set aside as contrary to the law of the case. The law as applied to the issues and the evidence, did not justify the allowance of the estimated value of the cargo at Pensacola.

Even in those exceptional cases where the defendant can avail himself by way of set-off of acts of non-feasance or misfeasance of the plaintiff, such a defence does not authorize the court to certify a sum as due by plaintiff to the defendant. *Wat. on Set-off*, 168.

The action of the court was not in accordance with the law applicable to the facts and pleadings. As to the other matters discussed, which involve a consideration of the facts, we deem it proper to say nothing, as the case must again go to a jury.

Judgment reversed and new trial awarded.

SILAS GLADDEN, APPELLANT, VS. THE STATE OF FLORIDA,
APPELLEE.

1. The act of the Legislature of 1868, relating to jurors, provides that the County Commissioners of each county shall make a list of 800 names of persons qualified to serve as jurors, from which list the grand and petit jurors are to be drawn. The commissioners of Jackson county furnished a list to the clerk of 302 names, from which the grand and petit jury were drawn. *Held*, That this was an irregularity, forming a proper ground of challenge to the array of the petit jury.
2. Where the whole number of any grand or petit jury are not summoned, it is the duty of the court to direct the clerk to draw a sufficient number to complete the jury from the list furnished by the county commissioners in the same manner as provided by law for the drawing in the first

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instance, and to issue a venire for the summoning of the persons so drawn. (Sections 5 and 32, act of 1868, relating to jurors.)

3. A special venire for talesmen to form a jury for the trial of a cause, when a sufficient number of jurors regularly drawn and summoned cannot be obtained by reason of challenge or otherwise, is proper, and the court may cause jurors to be summoned from the bystanders or from the county at large to complete the panel. Section 21, act of 1868.
4. An application for a second continuance upon an affidavit which discloses the fact that the witnesses reside and are beyond the limits of the State, may be refused for that reason, and such refusal forms no ground for the granting of a new trial upon an appeal by this court.
5. Where an affidavit for a continuance fails to show that the testimony of an absent witness is material, it forms no ground for a continuance.
6. The circuit judge charged the jury, on the request of counsel for the State on the trial of an indictment for murder, that "if the State proved a deliberate killing, not the mere fact of killing, then it was for the prisoner to prove that it was not murder, and if he has failed to do so, you will find the prisoner guilty." *Held*, That this charge was erroneous. It should have been qualified by adding, in substance, "unless the circumstances showing that the killing was not murder, or other grade of crime, appeared by the testimony produced by the prosecutor."
7. An irregularity in the drawing or summoning of a grand jury (as that the grand jury was drawn from a list of 302 names, instead of 300 as provided by statute) may be taken advantage of by plea in abatement to the indictment, which plea must be interposed before pleading in bar.

This is an appeal from the Circuit Court for Jackson county. The appellant was indicted and convicted of the crime of murder. The case is sufficiently stated in the opinion of the court.

J. F. McClellan for Plaintiff in Error.

In arguing the errors assigned, I will consider the first, second and third together.

The prisoner's motion to quash the venire and his challenge to the array of petit jurors, called the regular petit jury, should have been sustained and the jurors not forced upon the prisoner. Those persons were improperly there as jurors. They were taken from a list of three hundred and two, and furnished to the clerk of the court by the county

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commissioners under the 3d section of the act of 1868. The board exceeded their authority in drawing 302 jurors. The highest number that could be drawn in any county is 300. See section 3, acts 1868. If they could draw 302, they could draw 1,000. By this error the whole list was vitiated.

The special venire was void. See section 21 of acts of 1868. The exigency provided for in the section did not arise, because no jury had been legally drawn.

4. The refusal to grant a continuance was error. The affidavit was full in every respect, the witnesses were under subpoena, and their evidence material. 9 Fla., 490; 12 Fla., 562.

5. The fifth error is well taken. The reply of the juror to the question asked by the court that the "prisoner ought to be hung," showed plainly the question put by the court was erroneous. The reply of the juror was responsive to the question by the court, and well calculated to affect the minds of the jurors already sworn.

6. This error is undoubtedly well assigned. The verdict guilty, was not in accordance with the charge of the court. He should have stated the degree of the guilt, and the motion of the prisoner was to have the jury polled to show they did not intend by their verdict that he was guilty of murder. His motion was to rebut the presumption, and should have been allowed. This was clearly his right and it was error to refuse it. 5 How., (Miss.) 730; 19 Conn., 388; 5 How., (Miss.) 388; 17 Ala., 587 and 618; Wright's Ohio, 75; 8 Missouri, 495; 9 Yerger, (Tenn.,) 279.

7. The seventh error is well taken. The charge of the court was too broad. The court should have qualified the charge by charging "that if it appeared from the evidence by the State that there was no malice," then, &c. 8 S. & M., 401; Wright's Ohio, 20. It makes no difference that the whole rule had been given in a former part of the charge; it should have been repeated here. 9 Fla., 163.

8. The court had charged that the jury should find the

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degree of the prisoner's guilt. This they did not do, and therefore it was contrary to the charge of the court.

9. This error is embraced in the seventh. The charge was too broad and should have been qualified.

10. The prisoner was the best judge of his peril and the court should have given the jury the right to look at all the circumstances and to have concluded as to whether the prisoner believed that he was in imminent peril after the threat and at the time of killing. The charge excluded them from from this their province.

11. When looking at the whole case the court should have granted a new trial, because it fully appears the evidence of witnesses under subpoena for prisoner and material to his defence was not had.

J. B. C. Drew, (for Att'y General) for the State.

RANDALL, C. J., delivered the opinion of the court.

The appellant assigned for error that the court overruled his "motion to quash the regular venire" and his challenge to the array of petit jurors. It was shown upon the challenge and the motion to quash, that the county commissioners had furnished to the clerk a list of three hundred *and two* (302) names of persons qualified to serve as jurors, from which list the jury was drawn, whose names were inserted in the venire issued to and served by the sheriff for the term at which the prisoner was tried.

The act of 1869 relating to jurors provides that the board of county commissioners shall select from the list of registered voters in their respective counties and make out a list of three hundred persons properly qualified to serve as jurors, and furnish this list to the clerk. It is urged that the list furnished, being in excess of the legal number, is unauthorized and illegal. However unimportant the discrepancy may seem to be, we consider that the appellant had a right to demand a strict compliance with the law in the drawing

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and empaneling of a jury. Irregularities, however slight, when they show a departure from the provisions of law in respect to the selection, summoning, and empaneling of jurors, are proper grounds of objection to the jury, and form grounds of challenge to the array. Wharton's Am. Crim. Law, 3d ed., 945, and 1,041, and authorities cited.

The 2d error assigned is, that the court erred in overruling the motion of the prisoner's counsel to quash the special venire for the term.

The record shows that there was a failure to summon the whole number of petit jurors named in the venire, and that a special venire was issued to the sheriff requiring him "to summon twenty good and lawful jurors" * * "to serve as petit jurors at the present term of this court." Section 32 of the act of 1868, relating to jurors, provides that "if for any cause the whole number of any grand or petit jury should fail to be summoned according to the provisions of this chapter, the judge of the court may direct the clerk to draw, in the manner provided in this act, grand and petit jurors, and issue a venire to the sheriff, or other officer, directing him forthwith to summon a sufficient number for such grand and petit juries." The "manner" of drawing jurors to supply the deficiency is prescribed by section 5 of said act, which was not the mode pursued in the case at bar. The motion to quash this special venire should have been granted.

The third error assigned is, that the court overruled the prisoner's motion to quash the special venire for talesmen summoned for this cause and from which the jury to try this case was selected. We do not think any error was committed in this manner; a venire for two hundred and fifty persons competent to serve as jurors, was issued for the purpose of selecting a jury for the trial of this case.

It is objected that they should have been selected from the list furnished by the county commissioners, but by section 21 of the before mentioned act, relating to jurors, the

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court is required to cause jurors to be summoned from the bystanders or from the county at large to complete the panel whenever a sufficient number of the jurors duly drawn and summoned cannot be obtained for the trial of any cause. From the fact that the court directed the summoning of the two hundred and fifty, we infer (though the record does not clearly disclose the fact,) that the regular panel had been exhausted, and if so, the proceeding was in accordance with the requirements of law.

The 4th ground of error is, that the court refused the prisoner a continuance upon his affidavit filed.

The affidavit shows that three of the required witnesses were absent from the State and resided in Alabama, some fifty miles from the place of trial. That "he has used every effort to procure their attendance; that they have assured him they would be present at this term of the court; that he had sent them messages and written them letters urging them to be here, and they are not absent by his consent or procurement."

The affidavit sets out the substance of what he expects to prove by them, and states that the application is not made for delay.

This was the second application for continuance since the finding of the present indictment.

It has been held in a great variety of cases that a continuance will not be granted upon such an application, where the absent testimony or witness is beyond the process of the court, unless the prisoner has had no time to prepare his defence. *Foster C. L.*, p. 2; *State vs. Lewis*, 1 Bay. 1; *State vs. Fyles*, 3 Brevard, 304; *Mulls' case*, 8 Gratt., 695; *Wharton's Am. Cr. Law*, 940, 3d ed.

Another witness, Head, is stated to have been subpoenaed, who resides in Jackson county where the trial was had, but the testimony of this witness is shown by the affidavit to be quite immaterial, showing simply that an altercation had taken place between the prisoner and the deceased over three

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months prior to the homicide. The circuit judge could well judge of the expediency of granting the continuance upon the case made by the affidavit, and it is not such a case as will warrant this court in controlling his discretion. See *Gladden vs. The State*, 12 Fla., 562.

The seventh error alleged is that the court charged the jury at the request of the attorney for the State that "if the State proved a deliberate killing, not the mere fact of killing, then it was for the prisoner to prove that it was not murder, and if he has failed to do so you will find the prisoner guilty."

It was held in the case of *Holland vs. The State*, 12 Fla., 117, that the implication of malice arises in every instance of homicide, and in every charge of murder, the fact of killing being first proved, the law will imply that it was done with malice, and all the circumstances of accident, necessity or infirmity, are to be satisfactorily proved by the prisoner, *unless* they arise out of the evidence produced against him.

This has also been held by this court in the case of *Dixon vs. The State*, decided at the present term, and see *McDaniel vs. The State*, 8 S. & M., 401. The circuit judge, in giving this charge, at the request of the prosecution and after the whole ground had been gone over upon this point, erred in omitting the essential qualification, "unless the circumstances showing that it was not murder have been proved by the evidence produced against him." In a former portion of the charge this qualification was substantially given, but because the instruction asked for was the last given to the jury on the subject, it may have tended to mislead them.

There are several other errors assigned, but we do not think they are substantial or that the prisoner's case was prejudiced by the proceedings therein alleged.

We have treated a paper found incorporated into this record as the charge and instructions of the judge to the jury, because it has been so treated by counsel on both sides. It may be improper to consider every paper found copied

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into a record by the clerk as properly a part of the record merely because it is so copied. Serious inconvenience is sometimes occasioned by the want of proper care in this respect. We desire to call attention to the provisions of chapter 140, laws of 1847-8, "An act to amend the several acts regulating judicial proceedings," which indicates the method of preparing the charges and instructions given to juries upon the trial of all common law causes, and to remark that unless the provisions of this law are observed, unnecessary expense and delay may follow the omission for which neither party may be responsible.

There is another feature in this case not embraced in the assignment of errors, upon which we desire to make a suggestion. In the body of the record we find that the counsel for the prisoner challenged the array of grand jurors, and asked that the venire be quashed after pleading in bar, upon the ground that the grand jury was drawn from the list of 302 names instead of 300 names of persons qualified to be jurors. We have already said that an irregularity existed in this particular, which was an error of which the accused might avail himself.

In Massachusetts, New York and other States, it has been held that objections to the legality of the returns of grand jurors cannot affect an indictment found by them after it has been received by the court and filed; that such objection must be interposed before indictment found, and even before the grand jury is sworn. But it seems to be now settled that such objection may be made by plea in abatement to the indictment at any time before pleading in bar. This is substantially the rule announced by the Supreme Court of this State in *Ditrol vs. The State*, 9 Fla., 9. The opinion of the Supreme Court of Mississippi in *McQuillen vs. The State*, 8 S. & M., 587, delivered by Chief Justice Sharkey, announces what we consider the true and correct practice in such a case. Such matters are reached by plea in abatement only, (though in some States a challenge to the array

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is treated, we do not say properly so, as a substitute for a plea in abatement) and matters in abatement in criminal as well as in civil cases must be pleaded before pleading in bar.

The judgment of the Circuit Court is reversed and a new trial awarded.

THOMAS DIXON, APPELLANT, VS. THE STATE OF FLORIDA,
APPELLEE.

1. The plea of the prisoner in a capital case must precede the swearing of the jury.
2. When there is sufficient in the record to show the presence of the prisoner in Court during the proceedings, the omission to read the indictment to the prisoner, and to demand of the prisoner whether he is guilty or not guilty of the charge, is waived by his pleading to the indictment.
3. The prisoner having entered the plea of not guilty, concluding to the country, the addition of the similitur by the State is not essential to the regularity of the conviction, and its omission does not authorize an arrest of the judgment.

Thomas Dixon was indicted for and convicted of murder in the first degree in the Circuit Court for Duval county.

He moved an arrest of judgment on the following grounds:

"First. There was no legal arraignment of the prisoner.

"Second. The court erred in excusing all the regular panel but one juror, thereby compelling the defendant to choose the remaining eleven jurors to try him, from talesmen and bystanders.

"Third. There is not sufficient identity of the prisoner in connecting him with the act alleged to be committed to warrant a conviction.

"Fourth. The verdict of the jury is contrary to law in

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this, that all the allegations in the indictment are not proved, especially as to the means by which the killing was done.

"*Fifth.* The verdict of the jury is not sustained by the weight of the evidence."

D. C. Dawkins for Appellant.

E. K. Foster, Jr., State Attorney, for the State.

WESTCOTT, J., delivered the opinion of the court.

The causes on which a motion in arrest of judgment should be grounded, are confined to objections which arise upon the face of the record itself. The matters set up in most of the grounds above stated for the motion, would have been applicable to a motion to set aside the verdict and for new trial in the court below. No such motion being made in the Circuit Court, we have here no action of the court below in this respect to review, and it is too late to ask for a new trial in this court on account of the general character of the evidence and like matter.

The first ground for the motion is, that there was no arraignment.

That portion of the record which should disclose the arraignment and plea in this case is as follows:

"And now on this day comes E. K. Foster, Jr., Esq., who prosecutes the pleas in behalf of the State, and also comes the defendant, who, being placed at the bar, whereupon the court ordered the jury to be empaneled from the talesmen duly summoned, having excused all the regular panel but one. The clerk then addressed the defendant as follows: Thomas Dixon, stand up—hold up your right hand. You are now set to the bar to be tried, and these good men, whom I shall call, are to pass between the State and you upon your trial. If you would object to any of them, you will do so as they are called and before they are sworn. You have a right to challenge twenty of these jurors per-

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emptorily, and as many more as you have good cause for challenging. Thereupon came the following, to-wit: John Pelot, John E. Fretwell, Milton N. Parcells, J. C. Grace, H. Berlack, E. W. Denny, J. J. Holland, T. W. McCormick, George A. Hartley, W. B. Churchill, P. R. Jarvis and I. M. DeWall, who, being duly sworn to well and truly try and true deliverance make between the State of Florida and the defendant, and a true verdict render according to the evidence. The jury being duly empaneled, the clerk proceeded as follows: Thomas Dixon, stand up—hold up your right hand. Gentlemen of the jury, hearken to an indictment found against the prisoner at the bar by the grand inquest for the body of this county. To this indictment the prisoner pleads not guilty, and puts himself upon his country for trial, which country you are. Good men and true, stand together and hearken to the evidence.”

There is much in this entry which is unnecessary. Strictly speaking, the record should contain the arraignment proper, the plea, and the issue which is usually entered thus, and afterwards, to-wit: At the same term of the said Circuit Court, in the county aforesaid, on the —— day of —— A. D. 1869, before the said —— Judge of the Circuit Court for the —— Judicial District of the State of Florida, cometh the said Thomas Dixon, under the custody of —— sheriff of the county aforesaid, being brought to the bar here in his proper person by the said sheriff, to whom he is here also committed, and forthwith being demanded concerning the premises in the said indictment above stated, and charged upon him how he will acquit himself thereof, he saith that he is not guilty thereof: and thereof, for good and evil, he puts himself upon the country, and —— Esq., State Attorney, who prosecute for the State in this behalf, doth the like.

While this is the proper form, it is, however, not essential that the record should contain the similitur. I Chitty's

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Crim. Law, 720; Bishop's Crim. Proc., 927; 4 Burrow, 2085; 7 Miss., 190; 5 Ired., 139; 11 Ind., 311.

There is so much of an arraignment in this record as identifies the prisoner and discloses his personal presence in court, and whatever may be the rule where an arraignment is entirely omitted, we are satisfied that the failure to read the indictment or to demand of the prisoner whether he is guilty or not guilty, and asking him how he will be tried, is cured by his appearing and pleading to the indictment. The purpose and end of reading the indictment and making the demand is to advise the party of the nature of the accusation and to learn what he has to say in reference thereto, and if he advises himself and answers the accusation by plea, he waives these formalities, which are mere preliminaries looking to that result. *State vs. Hughes*, 1 Ala., (new series,) 657; *People vs. Corbett*, 28 Cal., 330; *Douglass vs. The State*, 3 Wis., 820; *Cook vs. The State*, 26 Ga., 593.

This view is fully sustained by the remarks of Chief Justice Marshall, in the very celebrated trial of Aaron Burr. In this trial the prisoner having been brought into court, and some question arising as to form of arraignment, remarks as follows passed between the counsel and court:

MR. WIRT—The usual form requires the actual arraignment of the prisoner; however, the court may dispense with it if it think proper.

MR. HAY was indifferent about the form, if the law could be substantially executed. He supposed that a simple acknowledgement of the prisoner was sufficient without the customary form of holding up the hand.

CHIEF JUSTICE—It is enough if he appear to the indictment and plead not guilty.

An examination of the citations, made to support the view in 1 Chitty's Crim. Law, 419, will show that the case presented by this record is not within the principle of those cases, and a reference to the case in (1 Morris, 18,) Iowa, the only American authority cited to sustain the proposition of

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the appellant, will show that in that case "there was no evidence from the record *that the defendant pleaded, that he was arraigned, or that he even personally appeared.*"

In the case of Jacobs vs. The Commonwealth, 5 Sarg't & Rawle, 317, the court say: "The entry of the arraignment is the record of the defendant's appearance in the court, and it is necessary only where he must appear in person." Without going so far as to say that his presence cannot otherwise be made to appear than by a formal arraignment, we have, in fact, in this case so much of an arraignment as discloses the personal presence of the party about to be tried, and hence this case comes up to the rule stated in Pennsylvania, admitting it to be correct.

There is no entry in this record to the effect that the prisoner pleaded before the jury were sworn. It does appear with sufficient certainty that a plea was interposed, but it was after the jury was sworn.

The conclusion from this record is, that the prisoner was brought to the bar of the court, and without being required to plead to the indictment a jury was elected and sworn, when there was no plea or issue, and that after this, for the first time, the defendant was called on for a plea, and did plead.

The case of the State vs. Hughes, 1 Ala., 657, is a case precisely in point. Collier, C. J., delivering the opinion of the court in that case, remarks: "This proceeding cannot be sustained without a wide departure from established usage. Though a formal arraignment of one charged with a criminal offence may not be indispensable to the regularity of a conviction, we think it clear that the case must be put in a condition for trial before the jury is sworn. Such is the settled cause of procedure according to the most accurate writers upon criminal law. 4 Black. Com., 322, 332, 342. The idea of selecting and swearing a jury to try a case, which, in its progressive steps, has not reached the stage when it is triable, is a perfect anomaly. The oath

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administered to the jury related to the present time, and cannot authorize them to try a case which is afterwards placed in a condition for trial. Until the prisoner was called on for his plea, it could not be known whether there would be an issue of fact for the jury, or what the issue, if any, might be. The prisoner, instead of submitting the question of his guilt, might have pleaded in abatement or have presented to the court legal objections to the indictment."

We do not think that this irregularity in the matter of the plea of the defendant is cured by the provisions of Sec. 26 of the act entitled an act relating to jurors, approved August 1, 1868, and we shall make the same order as was made in the similar case in Alabama.

The judgment of the court is reversed, and the prisoner is directed to be held in custody to await a trial *de novo*.

THOMAS DIXON, PLAINTIFF IN ERROR, VS. THE STATE OF
FLORIDA, DEFENDANT IN ERROR.

1. Under an indictment for homicide, where the prosecutor seeks to introduce a dying declaration of the deceased in evidence, it should be first shown to the satisfaction of the Court that at the time the declarations were made the deceased not only evidently considered himself in imminent danger, but that he evidently believed he was without hope of recovery. The circumstances under which the statements were made must be shown, in order that the Court may determine whether the statements should be given to the jury as dying declarations.
2. The admissions and declarations of a person accused of crime are competent evidence, and may be proven without first showing that no promise or threat had been held out or made to the accused to induce him to make the statements. If they shall be shown to have been made under improper promises or threats, they should not be received, or if already proved, the testimony should be rejected.

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3. It is not error for the Court to refuse to allow the question to be put to a witness, "whether it was not *possible* that he might have misunderstood what the prisoner said."
4. It is error to allow a witness to give his "understanding" of the meaning of declarations made to him by a person accused of crime, unless the witness is an interpreter or expert.
5. The person killed being a policeman, it is competent to give in evidence on a trial for murder threats of violence made by the accused shortly before the homicide against "policemen," though not particularly against the individual killed.
6. The question put to a witness, "Would you deem a man to be of sound memory and discretion who, under the circumstances, would make use of such an expression as he made in your store?" was properly overruled.
7. It is not error for the Court to refuse to repeat instructions already given to the jury.
8. The Court charged the jury that "when the killing has been proved, the accused must show that it was attended with circumstances of accident, necessity, or infirmity, to reduce it to a lower grade of crime," the accused being charged with murder; *Held*, That the Court should have added substantially, "unless they arise out of the evidence produced against him." Without such qualification the charge of the Court was erroneous, and calculated to mislead the jury, notwithstanding the Judge may have given the instruction correctly in a former portion of the charge.
9. The jury having returned into Court, asked the instruction of the Court upon a particular question, and the Court gave them an instruction verbally, and afterwards reduced it to writing from memory; *Held*, That under the statutes, the charge and instructions of the Court to the jury must be first reduced to writing, and given to them as written.
10. The Court should give counsel an opportunity to reduce to writing any special instruction, relating to points contained in his charge or instructions, and should give in writing, his own ruling of the law upon the points raised as presented, and declare the same to the jury.
11. It is not error to permit the jury to take with them, when they retire to deliberate, the written charge and instructions of the Court, provided they take the whole of them.

Error to the Circuit Court for Duval county.

Thomas Dixon was indicted for the murder of Ignatio Andrea, at Jacksonville, Duval county, on the 7th day of April, 1869, by assaulting him with a knife, of which wounding Andrea died on the 14th day of said month.

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The accused was tried at the Spring Term, 1869, of the Circuit Court for Duval county, and convicted. Upon appeal, the judgment of the Circuit Court was reversed, and a new trial awarded. The case now comes before this court upon a writ of error, a second trial having been had at the Spring Term, 1870, at which the accused was again convicted of murder, and sentence of death was pronounced.

The proceedings, so far as is necessary to present the questions raised by the assignment of errors, are set out in the opinion of the court.

D. C. Dawkins and *J. B. C. Drew* for Plaintiff in Error.

A. L. Woodward, Sr., (for Attorney General,) for the State.

RANDALL, C. J., delivered the opinion of the court.

The errors assigned by counsel for plaintiff in error will be considered in their order:

"1. The court erred in permitting the State Attorney to ask A. W. Dacosta, witness for the State, the following question: 'State the circumstances under which he, (deceased,) made the statements in relation to how he received the wound.'"

"2. In refusing to rule out the instrument which was submitted as dying declarations of the deceased."

3. In admitting the statements of the deceased given in evidence by Van Dohlen, a State witness.

These points lead to an inquiry into the question, so far as it is applicable to the present case, as to the admission of the declarations of the person injured, in regard to the circumstances of the injury which resulted in his death. "Dying declarations," as they are called, are admitted in evidence upon the general principle that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most

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powerful considerations to speak the truth. A situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by an oath administered in court. Woodcock's case, 1 Leach, 502. Dying declarations of a person who has been mortally wounded, with regard to the circumstances which caused death, are to be received with the same degree of credit as the testimony of the deceased would have been had he been examined on oath. Green vs. The State, 13 Missouri, 382; State vs. Ferguson, 2 Hill, S. C., 619; Oliver vs. The State, 17 Ala., 587; McLean vs. The State, 17 ib., 672. And it is a general rule that dying declarations, though made with a full consciousness of approaching death, are only admissible when the death of the deceased is the subject of the charge and the circumstances of the death are the subject of the dying declarations. Meade's case, 2 B. & C., 600. They are only admissible where the party making them knows or thinks that he is in a dying state. Positive evidence of this knowledge is not required, but it may be inferred from the general conduct and deportment of the party; and it is not necessary to prove *expressions* of apprehension of immediate danger, if it be clear that the party *does not expect to survive* the injury. Bonner's case, 6 C. & P., 386. The Supreme Court of Ohio, in the case of Montgomery, 11 Ohio, 424, say: "The substantial objection to the proof is, that it was received without a preliminary inquiry by the court establishing the fact that the deceased not only made the declarations while *in extremis*, but also that he was conscious of his true condition. It is this *consciousness*, coupled with the condition of the party, which supplies the place of an oath, and peculiarly distinguishes dying declarations from hearsay." It does not seem necessary that the deceased should have used any expressions declaring his belief that he would not recover, if his condition was such that he must have felt he was dying. In John's case, (1 East P. C., 357.) it was held by all the judges that if a dying person either

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declares that he knows his danger, or it is reasonably to be inferred from his wound or the state of his illness that he is *sensible of his danger*, his declarations are good evidence. In Spilsbury's case, (7 C. & P., 187,) it was held that for the purpose of determining whether the declarations ought to be received, the conduct of the deceased ought to be considered to see if it was that of a person convinced that death was at hand, and not merely the expression he used respecting his condition. Without further referring to the cases reported, it is considered that the true rule is, that in order to lay the foundation for receiving a statement as a dying declaration, it should be shown to the satisfaction of the court that at the time it was made the deceased not merely considered himself in imminent danger, but that he evidently believed he was *without hope of recovery*.

The first interrogatory to which objection was made, to-wit: an inquiry as to the circumstances under which the deceased made the statements in relation to the receiving of his wounds, was pertinent and proper. The circumstances under which the deceased made statements must of necessity be shown in order that the court may determine whether the statements were "dying declarations," and proper to be given in evidence to the jury. Whether these declarations are admissible in evidence is exclusively for the court to determine, (Huck's case, 2 Eng. C. L. Rep., 494,) and the question was a proper one for the purpose of informing the court. The answer of the witness related, in part, to what he had previously testified to, to-wit: that he last saw deceased alive on the night of the 7th of April, 1869; "he was dangerously wounded in the abdomen; he did make some declarations to me." Then in response to the interrogatory as to the circumstances under which the statements were made, the witness, Dacosta, answered: "He made the statements in view of his approaching dissolution; he was dying; he was in his own house; the prisoner, Mr. Rawson and Mr. Garvin were there; he was lying on the bed; there

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was no physician there at the time; the statement was made verbally and was then written." The question was then asked, "were the written and verbal statements the same?" The question was allowed to be answered after objection, and the witness said, "They were in substance." And here the witness being handed a paper, said it is the written statement that deceased made and subscribed. Witness then read the paper as the dying written statement of the deceased, as follows:

"State of Florida, Duval County. The dying deposition of Ignatio Andrea, says upon oath, that on the night of the 7th of April, 1869, in Jacksonville in said County, Thomas Dixon, in and upon him an assault did make with a knife, and him the said deponent did stab with a knife, which it is supposed will cause his death.

his

IGNATIO X ANDREA.

mark.

Sworn to, &c.

Witness Dacosta continues: "I think the deceased died on the 13th April, which is about six days after the 7th of April. I was there about three quarters of an hour."

This is the whole of Dacosta's testimony and all the testimony in relation to the dying deposition.

There was no testimony going to inform the court that the wounded man was either conscious that his wound was mortal, or that it was thought by deceased that it might prove fatal. Not one word as to whether he thought there was any hope of recovery. No physician was present at the time, and we are not informed by the record whether one had visited deceased at this time. The character of the wound is not described by the witness, nor does he say that he saw it. The statements of the witness give the opinion of the witness only as to the condition of the deceased. It does not appear that the writing was read to him, nor that he read it, or that he knew its contents, or that he signed it or swore to it. The language of the deposition is not appa-

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rently the language of the deceased, but it is put in the third person, like the common recital of an affidavit, and the words are those of the magistrate. There was no foundation laid for the introduction of this paper as a dying declaration, nor for the introduction of any "dying statements," and it should therefore have been excluded from the consideration of the jury. The testimony of Van Dohlen was that he saw Andrea lying on the floor of the piazza of Mr. Sedgwick's house "with his guts out." "He seemed to be wounded," and appeared to have a great deal of pain. "I asked Ignatio Andrea who cut him?" The State Attorney inquired "What did he say in answer to your question?" The court, against objection, admitted the answer, and witness testifies, "He said, the same colored man that was cursing in your store awhile ago, he cut me," (this referring to the plaintiff in error.)

There is the same absence of testimony going to show the consciousness, or apprehension of impending death, as in the instance first referred to, and there is really no ground for receiving this testimony except an imperfect description of the wounds, without anything further to show that the deceased knew the extent or character of the injury.

This testimony should have been rejected as mere hearsay, and because it was received and given to the jury the court erred.

It is further insisted that the court erred, 4th, in permitting the State Attorney to ask A. W. Dacosta, "Were the written and verbal statements the same?"

It is very clear that this method of proving and identifying the statements is quite irregular for the purpose of showing what the verbal statement was, but it is not very material or important here.

The 5th, 7th and 8th grounds of error assigned are that the court permitted the witnesses Rawson and Brown to state what were the declarations and confessions of the prisoner in relation to the transaction in question. It is insisted

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that the proper predicate was not laid, because it did not clearly appear that no inducement was held out to the prisoner to make the confessions or admissions; that they do not amount to confessions of guilt; were not made deliberately but under excitement; were not attended with sufficient corroborating circumstances, &c.

Whether the declarations of the prisoner were sufficient or of such character as to be taken as admissions of guilt, is not a matter to be considered by this court. It cannot be deemed necessary for the prosecution, in order to show the declarations of the accused, to first show that no inducement or threat had been held out or made to induce or draw out the declarations. The counsel refers to 2 Hale's P. C., 285, and 2 Hawkins, 604, as establishing the rule that "it must be testified that he made the statement or confession freely, without any menace or undue terror imposed on him." It will be noticed, however, that this doctrine as laid down by the English courts relates to the introduction of the written statement of the prisoner made before an examining magistrate under oath, in pursuance of a statute of Ph. and Mary, and thus was not considered as entirely voluntary. But the general rule is that admissions made by one when under compulsory process, (as where he is a witness,) are evidence against him. Roscoe's Cr. Ev., 48, 50, and cases cited. To require a prosecutor to show that no promises or threats had been made to the prisoner, would be in violation of a rule in regard to proving a negative, and in perhaps a majority of cases result in the exclusion of confessions and declarations, and the consequent defeat of the ends of justice.

In the present instance both Rawson and Brown expressly testify that the statements were made voluntarily; there was no hope or threat made or held out to him to the knowledge of the witnesses. This was even more than was necessary for the prosecutor to prove. The presumption is, that when an accused person makes statements in respect to the crime of which he is aware he is suspected, he will not make evidence

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against himself unless he intends to speak the truth. See 1 Phill. Ev., 397, 9th ed. Doubtless, if the prisoner had offered to show that any undue promise or threat had been made to induce him to make the statement, the court would have received the proof and refused to hear the statement, or if it had been subsequently shown that such threat or promise had been made and that the statement was obtained thus improperly, the court would have stricken out the testimony of such statements and directed the jury to disregard them. See Boswell's case, 1 Carr. & M., 584; 41 Eng. Com. Law, 318; Simon vs. The State, 5 Fla., 285. We perceive no error in receiving the evidence of the declarations of the prisoner. The testimony and circumstances and condition of the prisoner and the witnesses were proper to be considered by the jury.

The sixth error assigned is, that the court refused to permit prisoner's counsel to ask Rawson "if it was not possible that he might have misunderstood the prisoner." We think the court was correct. If the witness had stated that it was *not possible* that he might have misunderstood the prisoner, the court and jury would very naturally have disbelieved him. Such testimony could have had no weight whatever.

The ninth error assigned is, that the court refused to rule out the testimony of Margaret Allison as to previous threats of the prisoner, and as to her interpretation of the word "foothold," used by prisoner. The testimony of this witness was that prisoner made threats against deceased, and says, "the prisoner came to the door and was making some remarks at me; he said I was too high because I stayed with Ignatio Andrea; he said he was in determination to cut my *foothold* short, and if he did not do it in less than a week he would not do it at all. That was all he said." The prosecution then asked, "what did you understand by the word 'foothold' in the connection which you understood the word?" The court permitted the question to be answered,

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overruling objection, and the witness said, "I understood from the way the prisoner spoke that he would cut Ignatio Andrea; I just guessed what prisoner meant by what he said."

For aught that appears in the record, the court was correct in receiving the testimony as to the alleged threats, but in the absence of anything to show that the word "foothold" required interpretation by an expert, and that the witness was an expert in languages, we think it was proper that the jury and not the witness should have solved the question.

The 10th error alleged is, that the court admitted the testimony of Thomas C. Lloyd as to previous threats.

The testimony is, that deceased was a policeman in Jacksonville, and the question was asked of Lloyd whether on the day of the alleged murder he heard the prisoner make threats against any policeman. The witness said he did, "but not against any particular policeman." On being asked to state what those threats were, objection was made by counsel for prisoner and the court overruled the objection and allowed witness to answer.

Testimony of this character is admissible to show the *animus* of the accused at the time of the commission of the crime, and sometimes tends to identify the accused person, and is always allowed to go to the jury. Its weight is for their consideration. Murder in the first degree is defined by the statute to be the killing of a human being without authority of law, "with a premeditated design to effect the death of the person killed, or of *any* human being." In determining the nature and degree of the crime, the intent of the accused is to be ascertained, and this is often found in the character and language of threats made and the circumstances under which they are made.

The 11th error assigned is, that the court refused to permit VanDohlen to answer the question, "would you deem a man to be of sound memory and discretion who, under the circumstances, would make use of such an expression as he

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made in your store?" We do not find that the witness had previously made any statement in regard to the subject of sound memory and discretion, and the question was not therefore asked with the view of obtaining an explanation of anything he had testified to. If the questioner had any other purpose, the pertinency of the question is not discovered. The witness was not shown to be a proper one to give his judgment in regard to sanity or insanity. The jury were legally competent to form a judgment in relation to the extraordinary language referred to.

The twelfth error assigned is, that the court erred in its charge upon the subject of malice, and in refusing the special instructions offered by defendant's counsel on that subject.

An examination of the whole charge of the court, which is in the record, shows that the charge was quite full, and is in fact in the language of approved authorities. It is more full than was essential to the case, but it contains nothing calculated to mislead the jury. The special instructions asked for on that subject were fully covered by the charge already given, and it is not error if the court refused to repeat instructions already given.

The thirteenth error assigned relates to the charge of the court as to "cooling time." The charge in this respect is excepted to because it was irrelevant. If this were so, and it may have been, yet nothing is found in it which was calculated to prejudice the prisoner's case. It is in the language of the law.

The fourteenth ground of error is, that the judge charged the jury that "when the killing had been proved, the accused must show that it was attended with circumstances of accident, necessity, or infirmity, to reduce it to a lower grade of crime." This portion of the charge is contained in the bill of exceptions. On examining the whole charge, we find that the court had in a former portion of the charge used similar language, with this qualification added, that all the

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circumstances of accident, necessity, or infirmity, are to be satisfactorily proved by the prisoner, "*unless they arise out of the evidence produced against him.*" The latter is a very important qualification, and is the language of the Supreme Court in the case of *Holland vs. The State*, 12 Fla., 125. We find also on page 128, of the same case, that the court uses the same language that the circuit judge employs in this case, omitting, evidently by inadvertence, the qualifying concluding words last quoted. The head notes prepared by the able judge who delivered the opinion in the case of *Holland vs. The State*, show that the qualifying words expressed the idea of the court and the law of the case.

To say that the fact of the killing having been proved, the accused must show by evidence on his part that there were extenuating circumstances attending the homicide, would imply that proof of such circumstances, which may have been given by the prosecution, would not avail or enure to the benefit of the accused, but that in order to have the benefit of the circumstances he must show them by his own witnesses, and could not claim the benefit of testimony already given which might weigh in his favor—a proposition not to be entertained before the courts. And although the circuit judge had given the charge in this respect correctly in a former portion of it, the subsequent incorrect instruction may have produced an unfavorable effect upon the minds of the jury.

The fifteenth and nineteenth errors assigned are, that the court erred in its charge to the jury as to confessions. Upon examining the charge upon this subject, we do not discover that any error was committed. It is compiled from accepted authorities.

The sixteenth and seventeenth errors assigned are, "that the court erred in refusing to charge the jury as to proof of the venue," and "in refusing to charge that the means of killing are necessary to be proved." The charge in these particulars

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is full and explicit, and very nearly in the language in which the court was requested to repeat the charge; and in fact it was repeated in the form desired. As already observed, it is not error for the court to refuse to repeat a charge already given in full.

The eighteenth error assigned is, that the court erred in its charge to the jury upon the subject of dying declarations. We think the charge given was correct. As to the action of the court in admitting the declarations of the deceased, we have already sufficiently commented.

The twentieth error assigned is, "that the court erred in its charge to the jury upon the subject of sound memory and discretion." We discover no error in the charge upon this subject.

The twenty-first error assigned is, that the charge was too extensive, and therefore erroneous upon the subject of malice. We do not think that the jury could have been led into error by the charge in this matter.

The twenty-second error assigned is, that "the court erred in giving a part of the charge to the jury verbally, and afterwards reducing it to writing; and also in misquoting a juror's question and charging accordingly."

The bill of exceptions shows that the jury, during their deliberations, returned into court, when one of them inquired of the court "whether they had to believe all the testimony that was admitted, or if they could disbelieve any part of it?" whereupon the court charged the jury *verbally* before they retired, and reduced the charge to writing, &c.

The 8th section of "an act to provide writs of error in criminal cases," approved Jan. 4, 1848, is as follows: "That charges made by judges to juries in all criminal cases, shall be reduced to writing and filed in the case, and shall be exclusively on points of law; and that any violation of this section shall be deemed and construed to be error, from which a writ of error may be prayed as of right."

An act to amend the several acts regulating judicial pro-

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ceedings, approved Jan. 3, 1848, provides, "that upon the trial of all common law cases, * * it shall be the duty of the judge * * to charge the jury, * * and such charge shall be wholly in writing." That upon the presentment to the judge of instructions in writing, on points of law or exceptions taken arising on the trial, it shall be the duty of the judge to declare in writing his ruling thereon as presented, and pronounce the same to the jury as given or refused. That the judge in every case, when he shall refuse to give the instructions as prayed for, shall write out and declare to the jury, by way of instructions, his own ruling of the law upon the points raised, all of which shall be in writing, and shall be written out before the same are delivered; and "that all said instructions, as well those given as those denied, and also as well those prayed for by the parties as those declined by the judge, shall be signed and sealed by the said judge, and form a part of the record in the cause."

These provisions of law are plain and positive. A disregard or non-observance of these requirements, particularly in cases of felony, is a material error. Evidently, the purpose of the legislature was to afford parties the means of showing to the appellate court precisely what instructions had been given or refused, and that the charge and instructions might be prepared and delivered with care and deliberation, and that the infirmities of human memory might not be relied upon in recalling transactions of grave import, which occurred during the bustle and turmoil sometimes attending the business of a *nisi prius* term.

An instance in point occurs in the case at bar. The juror inquired "whether they had to believe all the testimony that was admitted, or if they could disbelieve any part of it?" The court charged them verbally, and then reduced his charge to writing as follows: "In regard to the query of the jury, 'whether they have the right to *reject* the testi-

mony allowed in by the court,' charged as follows: 'They cannot reject it,' " &c. The variance may not be very material, but the discrepancy is apparent, and illustrates the infirmity of the memory against which it was the purpose of the legislature to guard.

It is clearly the duty of the court to deliver its charge to the jury *as it has been written*, and not to deliver it orally and trust to memory to reproduce it in writing afterwards.

The twenty-third alleged error is, that "the court refused to allow the defendant's counsel to offer any special charge to be given to the jury upon the subject of the juror's question." The record shows that the defendant's counsel asked the privilege of submitting special instructions upon the subject of the juror's question, which the court refused to hear.

It is sufficient to remark, that the statute above mentioned expressly requires the judge, upon the presentation to him of instructions in writing which a party desires to have given to the jury, "to declare in writing his ruling thereon, as presented, and pronounce the same to the jury as given or refused;" and he shall write out and deliver to the jury his own ruling of the law upon the points raised. This statute recognizes expressly a right which before existed, that a person accused of crime should have the right to be heard by himself and by counsel in relation to every matter transpiring on his trial; and it would be an abuse of the judicial power to deny to him this right. The court should in all cases give to the accused a reasonable opportunity to reduce to writing such instructions as he might desire upon matters transpiring during the trial. A denial of this is a denial of his right to be heard in his defense.

The twenty-fourth error alleged is, that the court allowed the jury to take with them into the jury room all the written instructions which had been given in charge by the court, and refused to let them take also the instructions which had been offered by defendant and overruled.

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The charge of the court is, by law, a part of the record. It is required that the judge deliver it to the jury as it is written. If it is desired by the jury, it is difficult to perceive any good reason why they may not take to their room the writing itself. Indeed, they may thus better understand it, and avoid confusion in their deliberations. And yet, if the courts should permit any portion of the written charge to be taken by the jury, he should give them the whole of it. It is required that he write out his own ruling upon the points raised by the accused, and this is a part of the "charge." We do not understand clearly from the bill of exceptions that the judge did not deliver to them all that he had written out and declared to them. But we do not think it was the duty of the court to give into the hands of the jury the written instructions prayed for and denied, unless it seemed necessary to a proper understanding of the charge of the court thereon. It is not apparent that any irregularity occurred in this latter particular.

For the reasons stated, we are obliged a second time to reverse the judgment of the Circuit Court, and to award to the plaintiff in error a new trial.

JAMES E. COLLINS, PLAINTIFF IN ERROR, VS. THE STATE OF
FLORIDA, DEFENDANT IN ERROR.

1. Where facts are in issue under the pleadings, it is the exclusive province of the jury, under the statute regulating criminal proceedings in this State, to determine whether such facts are established by the testimony; therefore, in a prosecution for "receiving stolen goods, knowing the same to have been stolen," a charge of the court that "the place, the date, the value of the property, and the fact that a bale of cotton was stolen, have been fully established," is erroneous.

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2. It should appear that the indictment was delivered into court by a grand jury. In case the Clerk omits to make a minute of the fact of the delivery of the indictment into court by the grand jury, the court may order it to be done at any time during the term. *Query*: Whether such a minute is essential, or whether the fact of delivery does not sufficiently appear by the endorsement of the foreman of the grand jury, the indictment itself, and the file mark of the Clerk?
2. The record contains the following: "The grand jury came into open court and made the following presentment: State of Florida vs. James E. Collins—Receiving stolen goods, knowing the same to have been stolen." The indictment properly endorsed follows this entry. The prisoner is arraigned, tried, and convicted. *He'd*:
4. That it sufficiently appears from the record that the prisoner was tried in accordance with the Constitution "on presentment and indictment by a grand jury," and that the indictment was delivered into court by the grand jury.
5. The finding of a bill by the grand jury is shown by the endorsement of the foreman, to the effect that it is "a true bill." The endorsement is made under the law only "when so found" by the grand jury, and this act of the foreman being made by the statute the evidence that the bill was so found, courts cannot properly enlarge the statute or require evidence in addition to that prescribed by the statute, to show the finding of the grand jury.
6. The finding of the bill is not an act of the grand jury *in open court*, and it is not essential to the regularity of the proceedings in the court below that a special record entry or minute of the finding should be made in that court; nor is it essential that the extended record brought to this court by a writ of error should contain the finding endorsed on the bill. All that is required of the extended record which should be returned to this court with the writ of error is, that what that record contains shows, according to the accepted legal signification of the terms in which it is framed, that the grand jury presented to the court an indictment for the particular felony with which the party is charged.

James E. Collins, the defendant in the court below, was indicted in the Circuit Court for Alachua county for "receiving stolen goods, knowing the same to have been stolen." He was convicted and sentenced to imprisonment, at hard labor, for the term of three years. To this judgment he now prosecutes this writ of error. The points considered by the court are such as arise upon the record, which record is set out in the opinion of the court to the extent necessary to understand the questions determined.

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Finley and *Finley* for Plaintiff in Error.

A. R. Meek (Attorney General,) for the State.

WESTCOTT, J., delivered the opinion of the court.

None of the evidence in this case is before the court. There is a large mass of testimony and other matter accompanying the record, which cannot be considered for the reason that it is not embraced in a bill of exceptions, properly attested by the judge of the Circuit Court.

The charge of the court, however, was properly excepted to, and the charge, as well as the exception, is certified by the judge in such manner as requires notice. Were it necessary for the court in this case to have the facts or any portion of them before it, to determine the point of law raised by the exception to the charge, we could not examine the question; but it is unnecessary that any of the facts should appear, as one of the instructions given could not have been proper under any state of facts, being plainly in conflict with the statutes of this State.

The judge charged the jury that "the place, the date, the value of the property, and the fact that a bale of cotton was stolen from the Florida Railroad Company, have been established fully." Sec. 8 of an act to provide writs of error in criminal cases, approved January 4, 1848, provides, "that charges made by judges to juries in all criminal cases shall be reduced to writing, and filed in the case, and shall be exclusively on points of law; and that any violation of this section shall be deemed and construed to be error, from which a writ of error may be prayed as of right."

The judge in this case charged the jury that certain facts were "fully established." These facts were in issue, and it was the exclusive province of the jury to determine whether they were "fully established" by the testimony. This was error, and the court should have granted the new trial moved for by the defendant. 3 Fla., 33.

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The plaintiff in error being clearly entitled to a new trial upon this ground, it is unnecessary to consider the other errors assigned, which, if found to be well taken, would only entitle him to like relief.

There are other matters arising in this case, and which are brought to our attention in a proper manner, which should receive notice, as they arise anterior to the trial, and unless disposed of now, may occasion embarrassment.

It is made to appear that the plaintiff in error, before pleading to the indictment in the court below, offered to show by the testimony of the clerk that no record entry upon the minutes, as to the action of the grand jury in open court in reference to this indictment, was made by the clerk until several days after the discharge of the grand jury; that the court refused to hear evidence upon this subject, and that the defendant excepted to this ruling.

There is nothing erroneous in this action of the court. If it should be admitted that the fact that the grand jury make the presentment in open court should properly be entered by the clerk upon the minutes at the time the grand jury, in open court by their act, consummate and complete the accusation, it is not perceived how it is error, if being omitted at the time, the court directs it to be done afterwards during the term.

The court does not, by this act, add to or take from the acts of the grand jury—it does not thereby create or alter a finding or amend an indictment; it simply makes an entry upon the minutes of the court of a known fact in reference to the business and proceedings of the court, in the same manner as it would the entry of a verdict of the jury, by chance omitted in any particular case, or a judgment of the court upon a demurrer to pleas.

This question was considered in the case of the Commonwealth vs. Cawood, 2 Va. Cases, 527, where it was insisted by the State that the recording of the action of the grand jury in open court, in the matter of a presentment by indict-

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ment, was simple ministerial act of the clerk, and its omission could be supplied by an entry made *after the term*, in which the accusation was preferred. The court say, "a view of the decisions in this country and in England leads us to the conclusion, that during the term the records are in the breast of the court, and that amendments may be made in the proceedings of the court; but after the term has passed, no amendments can be made except mere clerical misprisions."

In 28 Ala., 11, the court directed the clerk, *after verdict in a capital case*, to make the entry upon the minutes, showing that the indictment has been presented by the grand jury in open court. Upon exception to this action of the court, and a writ of error from the Supreme Court, the Supreme Court affirm the judgment and remark that "where the trial and conviction occur at the term at which the indictment was found, the court may, at any time during that term, as well after as before the conviction, cause its clerk to endorse on the indictment '*filed*,' and to date such endorsement according to the fact, and to sign it; and may also cause an entry to be made on the minutes that the indictment was returned into court by the grand jury, and the day on which it was so returned into court. Over such matters the court has control during the term, and may alter, amend, or set them aside as justice may require."

The principle is amply illustrated by numerous cases in England and the United States. 1 Saunders, 250; 6 East, 328; 1 M. & S., 442; 1 Salk., 47; 2 Burr., 1,099; Chitty's Crim. Law, 752; 9 Fla., 541; 3 Iowa, 252; 16 Ala., 421; 2 Cush., 115-23-7; 7 Md., 442; 2 Va. Cases, 89, 111; 7 Eng., 62; 4 Cal., 238; 13 Mass., 455; 28 Ga., 236; 8 Mich., 70; 17 Texas, 237; Bish. Crim. Proc., 906-7. What was done in this case was done during the term, and the power of the court to this extent cannot be questioned, even as to judicial acts and distinct from ministerial. In England, where the indictment is sometimes removed to the Court of Queen's

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Bench, although found in an inferior court, this matter was contained in the caption of the indictment, which sets forth the judicial history of the cause to the time of finding the indictment. See the doctrine of amendments of the caption in England discussed in 1 Saunders, 249-50; 1 Chitty's Crim. Law, 327; Bish. Crim. Proc., 150.

We do not hesitate to say that the intimation in the case of Holton vs. The State, 2 Fla., 504, to the effect that it may well be doubted whether such an entry can be made during the same term after judgment, is entirely unsustained by any authority. It can be done after as well as before judgment, and there is no authority for the distinction there intimated. On the contrary, there is one case in the United States going so far as to direct the court below, after the term has passed, to make its record show by a *nunc pro tunc* entry the fact of presentment in open court. 19 Ark., 189.

The other questions to be considered in this case arise thus. The entry before mentioned as authorized to be made upon the minutes by the court, after the discharge of the grand jury, was (after stating the date and the convening of the court) as follows:

"The grand jury came into open court and made the following presentments, viz: State of Florida vs. James E. Collins—receiving stolen goods, knowing the same to have been stolen."

After verdict of guilty, the defendant moved in arrest of judgment, on the ground that there was no legal *record of the finding* of the grand jury, and that there was no sufficient record evidence of the fact that this indictment found against him had been presented or preferred against him by twelve of the grand jury in open court. His motion is overruled, exception is taken, and this action of the court is here assigned as error.

There is no objection urged here, either as to the body of or the endorsements upon the indictment. The bill, in full compliance with the statute, is endorsed thus: "A true bill,"

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Geo. Savage, Foreman," and is signed by the State Attorney as the statute requires.

The first case in the United States upon the subject of "record evidence," of the finding and of the fact that the grand jury have in open court accused the prisoner of the crime charged, is the case of the Commonwealth vs. Cawood, 2 Va. Cases, 527. This case has been followed in some respects in Tennessee, Illinois, Iowa, Arkansas, Mississippi and Indiana. 8 Yerg., 170; 7 Hamp., 155; 20 Ill., 430; 3 Scam., 85; 3 Gilman, 71; 3 Greene, 252; 24 Ark., 350; 19 ib., 188; 30 Miss., 403; 11 Ind., 304. There are other cases upon the same subject, which may well be considered. 20 Ind., 281; 21 ib., 79; 50 Penn. State, 9; 24 Ind., 142; 35 Ala., 421; 36 ib., 236; 27 Cal., 65; 2 Kan., 174; 1 ib., 313; 44 Penn., 131; 10 Iowa, 126.

It was decided in Virginia by a divided court, that an omission to *record the finding* was not cured by the regular arraignment of the prisoner, by his pleading not guilty, by spreading upon the record the "paper purporting to be an indictment." endorsed a true bill by the person who was foreman of the grand jury at that term, and by the recital in the record that he "stands indicted." All of these several matters combined appeared in that case from the record, and they were held insufficient evidence of the finding. In the case referred to, the prisoner moved that he be discharged before there was a verdict, and the court intimate that there would have been a difference after verdict.

The courts of the other States are not so particular to mention what the court in Virginia calls *the record of the finding* of the grand jury. They state the law thus:

"The record should always show that the indictment had been returned into court by the grand jury." 13 Ark., 720; 19 ib., 178.

"An indictment found should be presented in open court by the grand jury, and the fact should be certified of record." 3 Iowa, 249.

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"The record ought to show affirmatively the returning of the indictment into court by the grand jury." 3 Gilman, 71.

The court in *Chappel vs. The State*, 8 Yerg., 171, remarked, that "in the record before the court a bill of indictment is found endorsed 'a true bill,' and this endorsement is signed by the foreman of the grand jury, but no evidence or entry appears of record showing that the indictment was returned into court by the grand jury."

Blackstone, (4 Com., 306,) in describing the proceeding, says when the indictment is found, it "is publicly delivered into court," but what he says is simply by way of narrating the manner of proceeding, as he no where uses such language as would indicate a necessity for a special entry of the finding upon the extended record.

It is apparent that there can be sufficient evidence that an indictment has been thus publicly returned without necessarily making a *special record* entry of the finding.

There is a difference between the views of the court in Virginia and the views of the courts in the other States. The court in Virginia holds that there must be a "record of the finding" of the indictment. The other courts state the rule to be, that there should be evidence in the record establishing the fact that the indictment was presented in open court by the grand jury, some of them going so far as to require an affirmative entry of the fact. There is a difference in the requirements. What is meant by the "finding of a grand jury?" The practice in England in this matter is as follows:

When there is any complaint charging a party with a criminal offence, it is required that the prosecutor, (who is not the officer of the crown but a private person,) shall set forth and describe the crime in a bill engrossed on parchment. The grand jury, after having been duly sworn, charged and empowered to act, then hear the evidence adduced by the prosecutors in support of their respective bills. If from the evidence thus adduced they are thoroughly persuaded of the

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truth of the bill so far as their evidence goes, they endorse on the back of the bill "a true bill," if not, they endorse it "not a true bill." 4 Black., 303, 5; 11 Cush., 475; 13 N. H. 489.

The endorsement "a true bill," is what is called by the court in Virginia the "finding," and in reference to which it is said, "after a grand jury has found a bill and reported it *and their finding is placed on the record*, the indictment so found and endorsed becomes as much a part of the record as if it was spread in extenso on the order book, but in order to give it that character *we deem it essential that a record should be made of the finding in the order book*. The difference in the requirement is thus manifest."

This decision in Virginia, not sustained by the other American cases, so far as the necessity for a *special entry of the finding as distinct from record evidence of the fact that the indictment was delivered in open court by the grand jury* is concerned, is urged in support of the propositions made by the plaintiff in error to the effect, first, that such a distinct entry of the finding upon the order book is necessary; and second, that the entry has been made in this case (omitting the words a true bill,) is not sufficient evidence of the finding, and hence insufficient to justify the arraignment of the prisoner. In addition to which, it is understood by the court that it is insisted by the plaintiff in error that the entry here made is not sufficient evidence of an accusation against the defendant for the particular crime by the grand jury in open court.

We are of opinion that there is no necessity for the insertion upon the record of a special entry stating the finding of the grand jury, and that it is sufficient if upon the record there is enough to show a delivery of the indictment into court by the grand jury.

What is the reasoning of the court in Virginia upon which this conclusion as to the necessity for a special entry of the finding upon the order book is based? That court says we

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consider this entry to be essential, because from the year 1776 to this period, (1826,) it has been the uniform practice of the general court and of the circuit court to record the findings of the grand jury as part of the proceedings of the court, and because the statute requires that the proceedings of the court should be regularly placed on the order book. It is conceded that in this State the like practice has prevailed, but it is not correct to say that every act of the grand jury must become a matter of record by way of special entry.

We are not prepared to say that because it may be the practice of the circuit court to add to such an entry as we have in this case the words "a true bill," that such an addition is essential. Because that practice may be to do more than the law requires, cannot enlarge the law. This court has prescribed no such rule; no statute has prescribed it; and it is nothing more than a customary entry. Nor do we see that an entry of the finding upon the minutes or upon any particular order book is the record of an act of the grand jury in open court, should it be admitted that all their acts in open court must be made a matter of record. We know of no authority in England or the United States which requires this act of finding to be done in open court. It is usually done in the grand jury room, where, after a vote, the foreman, acting for the requisite number to find a bill, so endorses it. The statute makes it his duty to make this endorsement when the grand jury agree to it, and the endorsement should be accepted as evidence of that fact, unless in the face of the statute prescribing what that endorsement shall show, you are to presume fraud and improper conduct upon the part of an officer and require positive evidence to rebut such created presumption. The reasons given in the case in Virginia for the necessity of a special entry of the finding are not only unsatisfactory, but the conclusion of the court in this respect is unsustained by any well considered case in the United States, by any decision in England, or by the

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practice in making up the record there. A form of a record of an indictment and conviction for murder at the assizes in England is found in the appendix to the 4th volume of Blackstone, and it will be seen by reference to this extended record that the finding is not found in the record. The record brought by a writ of error to the Queen's Bench has no such thing in it. 3 Lord Raymond, 33. It cannot be doubted that such an endorsement by the foreman of the grand jury must appear upon the bill in the court below to justify the arraignment, as the statute, which is not simply directory, requires that "all indictments (by which is meant bills,) shall be endorsed on the back by the foreman of the grand jury when so found, 'a true bill' and signed by him." Towle vs. The State, 3 Fla., 202; 13 S. & M., 259; 3 How., 433; 19 Miss., 226; 3 Dana, 474; 2 Bibb, 210; 10 B. Mon., 125.

But we know of no rule of law which requires that an extended record, which should be made up by reference to the docket entries and to these endorsements and like things, must contain all of these endorsements, or in this case the endorsement of the finding. All that is required of the extended record is, that what that record contains, shows, according to the accepted legal signification of the terms in which it is framed, that the grand jury presented to the court an indictment for the particular felony with which the party is charged.

Mr. Bishop in his work on Criminal Procedure, speaking of this matter of endorsements and docket entries, as distinguished from the extended record, says: "When an indictment is found by the grand jury; the foreman writes upon it words 'a true bill,' and signs it with his name as foreman. Now, there are plainly certain stages of the proceeding in which this endorsement upon the indictment is more or less material, yet in the record as finally made up and extended, this endorsement, according to the form given us by Blackstone, does not appear. The simple statement that 'it is presented' so and so, covers all such things."

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Pearson, J., in the State vs. Guilford, 4 Jones, N. C., 83, 85, says, "it is not necessary that the record should set out the manner in which a bill of indictment was presented, or the evidence and memoranda and entries from which the record was made up. It is sufficient and most proper that the record should only set out the fact that it was presented by the grand jury," and it is there held that it is not necessary to copy into the record the entry of "a true bill," usual on the back of an indictment. In 2 Blackford, 153, the court remarks in reference to this endorsement on the bill, that a complete record, conclusive as to every material fact in the case, may be made up without it.

Having determined that a special entry in the record of the finding endorsed on the back of the indictment is not essential, it only remains to determine in this case whether it appeared from the entry made in the court below, and which entry now appears in the transcript of the extended record brought to this court by the writ of error, that the defendant was tried in accordance with the requirements of the Constitution, "on presentment and indictment by a grand jury." Sec. 8, Dec. of Rights, page 2 of Con. The language of the St. Joseph's Constitution under which the practice in this State arose was, "no person shall be put to answer any criminal charge but by presentment, indictment or impeachment," and the difference is that under the old Constitution the party might have been tried upon the presentment alone, while under the new Constitution there must be *presentment and indictment*.

The practice of trial upon presentment alone is illustrated in many cases. 13 East, 258; 9 Yerg., 359; 23 Ga., 580; Va. cases, 18, 19, 161; 5 Leigh 743; 1 Swann, 22; 2 Bay, 200; 7 Gratt., 637; 1 Kelly, 245.

Does this record disclose that the requirement of the Constitution has been complied with? Was the defendant tried upon presentment and indictment by a grand jury? The entry in the record is, "the grand jury came into open court

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and made the following presentment," viz: "State of Florida vs. James E. Collins—receiving stolen goods, knowing the same to have been stolen."

The indictment properly endorsed "a true bill," and signed by the State Attorney necessarily follows this entry in the record in the court below. There is really no necessity for all of these entries to appear, as before remarked, in the extended record, but when they do appear as in this case and nothing else appears, we must give them a construction. It is evident from this entry that the grand jury came into open court and took some action in reference to a crime known to the laws of this State, to-wit: receiving stolen goods knowing the same to have been stolen—that this action concerned the State of Florida as plaintiff, and James E. Collins as defendant. The record describes their action in reference to these subjects as a presentment. What then does this term imply? Does it or does it not necessarily mean in the connection in which it stands, an accusation? Is it consistent with its known meaning to infer that there was no accusation? If it does necessarily mean an accusation in the connection in which it stands and an indictment follows, spread out in extenso upon the record, then the necessary result of the evidence afforded by this record is that a grand jury came into open court and presented an indictment against James E. Collins for the crime stated.

Presentment, in its limited sense, is a statement by the grand jury of an offence from their own knowledge, without any bill of indictment laid before them, setting forth the name of the party, place of abode, and the offence committed, informally, upon which the officer of the court afterwards frames an indictment. In *Style's Prac. Reg'r*, 267, it is said "a presentment may be in English, but an indictment ought to be in Latin or it would be quashed," and the difference between a presentment in this limited sense and an indictment is thus stated: "An indictment is drawn up

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at large in Latin and brought engrossed to the grand jury to find; a presentment is a short note drawn up in English by the jury for instructions to draw the indictment by." Style's Prac. Reg'r, 510.

We have in our practice no such presentment, (although it is not prohibited by the Constitution,) nor do we have what is technically known as a bill of indictment by a private prosecutor, as in England. The State Attorney prepares here the bill. Presentment, generally taken, includes not only presentments in the form just stated, but indictments by a grand jury, (Tom. Law Dic., title, Presentment, Bac. Abrdg't, title, Ind.,) and in our practice except when it refers to what is called a general presentment, is used alone in that sense in which it is applicable to an indictment found by a grand jury. The term *ex vi termini* imports an accusation. Lord Coke says, (2 Inst., 739,) every indictment is a presentment, and it is clear that a presentment can be made by way of indictment, hence in this case the record affords evidence, first, that there was a presentment made in open court by the grand jury against the defendant for the offence charged; second, that that presentment was made by preferring an indictment against the defendant, and hence the record discloses that the prisoner was not held to answer the charge except after presentment and indictment within the meaning of the constitution.

We might, with all propriety, drop this case here, but we deem a contrast between the practice in England and some of the States, in this particular matter of a record of the acts of the grand jury, not inappropriate.

The records, as they are brought to this court, show a want of information upon the matter of the general structure and requisites of an extended record in both civil and criminal cases, which is not all creditable.

Everything that we have of practice, and in fact our entire judicial structure in this country, is framed with strict reference to the common law of England; and looking to

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the practice in the Court of Queen's Bench, we see no sanction for the rulings in this country to the effect that nothing but a distinct and particular entry of the precise fact, upon the record as sent to this court, can be accepted as evidence of the delivery of the indictment in court by the grand jury. The history of criminal practice in England discloses that the courts there have been, in many respects, more willing to attach importance to objections to the form of the indictment and like matters than the courts of the United States. This arises from the fact that our practice has grown up in a more advanced civilization. Our laws are less severe, and there is a wider discretion left in the matter of punishment. The great strictness in England is to be attributed principally to the fact that in early English history "the most trivial offence was punishable with death, and it was almost a foregone conclusion, if the sword of justice was once drawn, that it would be returned to its scabbard bathed in blood." Under this state of things it was but natural that kind and merciful judges, presiding in courts of criminal jurisdiction in England, should have attached great importance to matters which really appear often insignificant. We have had no like cause to produce a like effect in this country. Here the absence of such a state of things has led courts generally to a somewhat different practice, and in this country, as Bacon says of England, "in later years exceptions of this kind have not been much favored, especially if the indictment were in a superior court, and that which is omitted be in common understanding implied in what is expressed." Bacon Abr. Indictment, I.

Contrary to this view, however, in this matter of record of an indictment, brought to an appellate court by a writ of error, some of our courts in reference to the subject now under consideration appear to have gone beyond the requirements of the practice in the analogous case of a record of an indictment brought for trial to the Queen's Bench by a cer-

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tiorari issuing therefrom to the inferior court in which the indictment is found, or to the practice in the precisely similar case of a record of an indictment brought up for review by writ of error issuing from the Queen's Bench after judgment in the inferior court.

In the case of the Queen vs. Smith, reported in 2 Lord Raymond, 1,144, and the record of which is set forth in 3 Lord Raymond, 33, we have the record as it appears in the court of Queen's Bench, and to illustrate the subject being considered, and to inform the parties bringing such records here, it is inserted to the words of the indictment.

In the record as it appears in the Queen's Bench, is first, the writ of error and the return of inferior court upon the writ, which it is unnecessary to insert here. Then follows the record thus:

"Middlesex, (to-wit:) Be it remembered that at the general quarter sessions of the peace of the lady the Queen, holden for the county of Middlesex, at Hick's Hall, in St. Johns St., in the county aforesaid, on Friday in the next week after the feast of the Epiphany, to-wit: the twelfth day of January, in the third year of the reign of our lady Anne, by the peace of God, &c., before James Mundy, Sergeant-at-Law, Ralf Bucknell and others, justices of the said lady the Queen, assigned to keep the peace in the county aforesaid, and also to hear and determine divers felonies, trespasses and other misdemeanors committed in the same county, by the oath of William Rathbone, George Bishop, Lawrence Cross, William Smith, Peter Sparks, Robert Bedning, William Smart, Edward Hicks, Anthony Freer, John Farren, John Sutton, Nicholas Meeter, Edward Davenport, Richard Hale, Jeremiah Mason, Thomas Derry, Thomas Ward, Peter Sharp, Moses Wilkinson, Robert Pitts, Naham Copley and Thomas Beauman, honest and lawful men of the county aforesaid, then and there sworn and charged to enquire for the said lady the Queen, for the body of the county aforesaid, it is presented that Dorothy Smith, late of

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the county of," and so on, inserting the words of the indictment.

Making the necessary changes in this to correspond with the different state of facts, &c, we have a simple form embracing everything essential, instead of the insertion of all kinds of docket entries and memoranda which usually accompany the records brought here. It is thus seen that the record brought up by writ of error as it appears in the court of Queen's Bench, has no special distinct entry of the finding, nor does it have a distinct entry of the facts that a grand jury in open court delivered the bill. These matters are covered by the simple statement that by the oath, &c., of certain persons, (naming them,) it is "presented."

As to the practice when the record is removed by certiorari for trial. The indictment as it stands upon the file of the inferior court in England commences: "The jurors for our lady the Queen on their oaths present." When a certiorari issues to remove the record, and a return is made, a schedule is prepared by the clerk and annexed to the indictment, and both are sent to the crown office. This schedule describes the court before which the indictment was found, the jurors, (giving their names,) by whom found, and the time and place where found. This schedule is not a *paper put on the files of the inferior court in each case*, but is *made up in each case only* on the removal upon certiorari. When the indictment with the schedule reaches the Queen's Bench, then the *clerks of that court* from the schedule make up the caption of the indictment and affix it. 1 Stark. Crim. Pld'g, 233; Dick. Qr. Sess., 931; Bish. Crim. Proc., 145 and 6. The form of the caption thus annexed is as follows:

"Norfolk—At a general sessions of the peace holden at ———, in the county aforesaid, on the — day of — in the — year of the reign, &c., before A., B., C., D., and their fellow justices of our said lord the King, assigned to keep the peace of our said lord the King, and also to hear and determine divers felonies, trespasses and other misdemean-

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ors in the same county committed, by the oath of G., H., E., F., good and lawful men of the said county, sworn and charged to enquire for our said lord the King, and the body of the said county, it is presented," &c. Bish. Crim. Proc., § 149; 2 Hale, P. C., 165; 1 Chitty Crim. Law., 327.

The record of the lower court does not in the English practice contain a separate caption for each case, but there is one general caption for the term. Bish. C. P., 148; C. A. & E., 236, 249. It is thus seen how the indictment stands in the inferior court in England. What is called the caption, (and that is "the part of the record which comprehends the judicial history of the cause to the time of the finding of the indictment,") is made up by the clerk of the superior court from a schedule sent up attached to the indictment by the clerk of the inferior court, which particular schedule is no part of the files of the case in the court below, but it is prepared by the clerk from the general caption of the term. While this is the practice in England, in many of the States some greater evidence of the delivery of the indictment in court is required. Usually the courts require an express affirmative entry of this particular fact, while all that is required in England is the simple recital that by the oath of certain named persons sworn to enquire, &c., it is presented, &c.

These decisions seem to be based upon the presumption that the foreman of the grand jury does not discharge his duty, and that the officers of court contrary to law will receive and file indictments not delivered by the grand jury. In some of the States, a presumption that the foreman of the grand jury will not make such an endorsement except when so authorized by the requisite number of his fellows, and that the clerk of the court will not receive an indictment except from those authorized to prefer it, is permitted to operate, and the defendant is required to take affirmative action in the shape of a motion setting up the contrary to be

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the truth before the court will listen to him. 37 N. Y., 123; 35 Ala., 321; 36 Ala., 236.

In the case in New York there was nothing more than the simple commencement of the indictment without even a caption, and the court say, "it is true that it does not allege that it was found by a grand jury, or by the legal number of grand jurors, but these are plainly implied, because that body legally constituted alone have the power to present any one for trial. Should an indictment be found in an improper manner, or by an insufficient number of jurors, the way is open for redress by motion, which secures to the accused party immunity from an illegal trial or punishment." 15 Mass., 207, 8; Reg. vs. Hearne; 9 Cox, C. C., 433, 6; 10 Jurist N. S., 724; 32 Blackstone, 238; Bishop's C. P., 448.

In the case of Mose, a Slave, vs. The State, decided by the Supreme Court of Alabama so late as 1860, Walker, C. J., says:

"The point was made in the court below and is now pressed in this court that the defendant could not be subjected to trial upon the indictment in this case, because there was no formal entry of the fact that the grand jury returned the indictment into court. The objection was not that the indictment was really never returned into court by the grand jury, but that the fact of its return was not recited upon the minutes of the court. The question, presented are therefore simply whether the entry upon the minutes of the bringing of the indictment into court by the grand jury is necessary to constitute the indictment a legal accusation, and whether such entry is the only legal evidence of the return of the indictment."

The court, after giving the reasons for their conclusion, state it thus: "The inevitable deduction from these authorities is that when a written accusation is properly endorsed and returned by the grand jury into open court, it becomes a valid indictment and the obligation of the accused to answer is not destroyed by the clerical omission of a recital

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upon the minutes of the fact of the return.” 35 Ala., 427.

The judgment of the court below is reversed and a new trial is awarded.

C. C. SUTTON, APPELLANT, VS. THE STATE OF FLORIDA,
APPELLEE.

The Supreme Court has no appellate jurisdiction in cases of misdemeanor, and an appeal from a judgment of conviction had in the Circuit Court must be dismissed: *Held*, That the jurisdiction of the Circuit Court, in cases of misdemeanor, is appellate only.

Appeal from the Circuit Court for Volusia county.

The appellant was indicted by the grand jury of Volusia county, for exercising the power of a Justice of the Peace, without having observed the legal pre-requisites of qualification by taking the oath, &c. The indictment was found after the adoption of the constitution of 1868. Appellant was tried before the Circuit Court, found guilty, and sentenced to pay a fine, that being the penalty prescribed by law for the offence charged; from which judgment he appeals.

The Attorney General, in behalf of the State, now moves that the appeal be dismissed for want of jurisdiction.

Wilk. Call, for Appellant.

Attorney General, for Appellee.

RANDALL, C. J., delivered the opinion of the court.

The constitution confers upon the county court the “jurisdiction of all misdemeanors,” and upon the circuit court “final appellate jurisdiction in all cases of misdemeanor.” Art. VI, secs. 8 and 11. The Supreme Court has appellate

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jurisdiction "in all questions of law alone, in all criminal cases in which the offence charged amounts to felony." Sec. 5. By the statute, all offences punishable by imprisonment in the State penitentiary are felonies, and all other crimes are misdemeanors.

It is clear, from the provisions referred to, that if the offence charged is only a misdemeanor, there is no original jurisdiction in the circuit courts; its jurisdiction is appellate only, and for the same reason, the Supreme Court has no appellate jurisdiction; and notwithstanding that the circuit court may have inadvertently entertained and tried the case, (and it does not appear that any question of jurisdiction was raised,) this court has no power to apply a remedy in this form of proceeding.

If the party is held in actual custody, under a judgment which is void for want of jurisdiction of the subject matter in the court in which he was convicted, he may have another remedy.

The appeal in this case is dismissed for want of jurisdiction.

MARLAN M. MORGAN, PLAINTIFF IN ERROR, VS. THE STATE
OF FLORIDA, DEFENDANT IN ERROR.

1. An indictment for larceny of chattels should show the time and place of the commission of the offence, and the value of the property alleged to be stolen; and if either be omitted, the defect is incurable.
2. Under the statute prescribing a punishment for "fraudulently marking an unmarked animal, with intent to claim the same, or to prevent identification by the owner," an indictment should set forth the offence in the language of the statute, the intent to defraud being the essence of the offence. A charge that defendant "wilfully and feloniously marked an unmarked animal," is not sufficient.

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Error to the Circuit Court for the county of Volusia.
The case is stated in the opinion of the court.

Sanderson & L'Engle, for Plaintiff in Error.

A. R. Meek, (Attorney General,) for the State.

RANDALL, C. J., delivered the opinion of the court.

The plaintiff in error was indicted at the Fall Term, 1869, of the Circuit Court for Volusia county. The indictment charges that "M. M. Morgan, late of said —, laborer, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on or about the 8th day of May, A. D. 1869, did, in the peace of God and of the State of Florida, then and there being, wilfully and feloniously take, steal and carry away one calf, the property of James H. Prevatt.

And, so, the jurors aforesaid, upon their oath aforesaid, do further say, that the said M. M. Morgan, in manner and form aforesaid, did wilfully and feloniously mark an unmarked animal, to-wit: "A calf, the property of James H. Prevatt, of the value of five dollars, with intent to claim the same, contrary to the statute," &c.

The accused was tried and found guilty, and sentenced to imprisonment, at hard labor, in the State penitentiary for two years.

The assignment of errors sets forth nine grounds of error, relating principally to transactions at the trial and to the charge of the court. As there is no bill of exceptions, however, we cannot know what transpired between the time of swearing of the jury and of giving their verdict, and can notice only such matters as appear upon the face of the record.

The indictment seems to have been treated as consisting of two counts—charging two distinct offences; but from its peculiar phraseology, the first count seems to be a statement

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of certain facts upon which the charge in the second count is based, there being no conclusion to the first, and no facts stated in the second.

It is essential in charging the offence of larceny, that the time and the place of the taking, and the value of the property stolen, be definitely stated. Charging that the offence was committed "on or about" a certain day, has been uniformly held to be indefinite, and fatal upon demurrer or motion to quash. What may be the effect, upon this point, of the statute relating to technicalities in indictments, it is unnecessary to determine here. We desire only to call attention to a very loose and dangerous practice.

The statement of the place or county where the offence was committed, cannot be omitted without vitiating the indictment. "If no time or place be stated, or if the time or place stated be uncertain or repugnant, the defendant may demur or move in arrest of judgment, * * for the defect is not cured by verdict." Archb. Cr. Pl., 14; 2 Hawkins, Ch. 25, sec. 77; 5 Term R., 162. "At the common law no indictment can be good without expressly showing some place where the offence was committed, which must appear to have been within the jurisdiction of the court." 2 Hawk. Ch. 25, sec. 83. The defendant is, moreover, entitled to be informed of the time when, and the place where the offence is alleged to have been committed, in order that he may be enabled to prepare to meet the charge. The statute also requires that all criminal causes shall be tried in the county where the offences are committed, with only exceptional cases, and subject to the power of the court to order a change of place of trial.

In an indictment for larceny of goods and chattels, it is necessary to allege the value of the property stolen, for at the common law there can be no larceny of property unless it be of some value. Under the statute it is peculiarly necessary to allege the value, in order, to determine the jurisdiction, for if the value of chattels stolen does not exceed

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twenty dollars, the offence is a misdemeanor, to be tried only before the county court, the criminal jurisdiction of the circuit court being confined to offences "amounting to felony."

The latter part of the indictment was evidently intended to cover the offence mentioned in section 51, page 78, laws of 1868, which reads, "if any person shall fraudulently alter or change the mark or brand of any animal, or shall fraudulently mark or brand any unmarked animal with intent to claim the same, or to prevent identification by the true owner thereof, the person so offending shall be punished by imprisonment in the State penitentiary not exceeding five years."

It is observed that this indictment not only does not state either the time or place of committing the offence, but it omits to charge that the marking of the animal was done "fraudulently." The gist of the offence is the intent to defraud the owner. It is a general rule, that unless the words of the statute (creating an offence) be recited, neither the words "contrary to the form of the statute," nor any periphrasis, intendment or conclusion will make good an indictment which does not bring the fact prohibited or commanded, in the doing or not doing whereof the offence consists, within all the material words of the statute. 2 Hawk. P. C. C. 25, sec. 110.

Our statutes go a great way in curing formal defects in indictments, but we are not able to extend them to a case like the present. The verdict and judgment must be set aside, and this cause remanded, with directions to the circuit court to quash the indictment.

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MOSES E. BARBER, PLAINTIFF IN ERROR, VS. THE STATE OF
FLORIDA, DEFENDANT IN ERROR.

1. The laws of 1868, (p. 68, § 46,) provide as follows: Whoever, without lawful authority, forcibly or secretly confines or imprisons another person within this State against his will, &c., shall be punished by imprisonment in the State penitentiary not exceeding ten years. The indictment charges that the defendant "did forcibly confine and imprison within this State, against his will, one George Bass:" *Held*, That the indictment failing to charge that the confinement and imprisonment was "without lawful authority," does not allege an offence under the statute or at common law.
2. A judgment will not be reversed on account of the refusal of the court to grant a continuance, unless there appears to have been an arbitrary and oppressive exercise of the discretion vested in the circuit court.
3. In applying for a change of venue in criminal cases upon the ground that a fair trial cannot be had in the county, the statute contemplates that facts shall be stated which satisfy the court that the motion is well founded. But whether this court can review the action of the circuit court in the exercise of its discretion in this matter, *quere?*
4. The challenge of a juror for cause does not preclude the exercise of the right of peremptory challenge afterwards.
5. It is the duty of a court under the laws of this State to hear any competent evidence in support of a valid objection to the competency of a juror, as by the examination of witnesses, and the like.
6. A person indicted for unlawfully imprisoning or confining another, may show in his defence or justification that the party confined or imprisoned was committing an offence, and that the arrest or confinement was for the purpose of taking the offender before a magistrate. The circumstances attending the arrest may be shown by the party arrested or confined, unless he decline to answer for lawful reasons.
7. When under the act of 1865, the defendant in a criminal case has been allowed by the court to make a statement of the matter of his defence under oath, before the jury, it is error for the court to charge the jury that they "cannot take such statement into consideration as evidence." The jury may take such statement into consideration, and attach to it such importance as in their judgment it may be entitled to. The court has only to judge of the propriety of allowing the defendant to make the statement.
8. A charge to the jury that if they "find that the defendant forcibly imprisoned or confined another without legal authority, against his will,

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and that it was within this State, then it is your duty to find him guilty," is erroneous. The offence must be shown to have been committed within the county named in the indictment.

9. The act of the Legislature of 1866, authorizing Judges of the Circuit Courts to hold extra and special terms whenever in their judgment the public welfare and the cause of justice require it, is not repugnant to the letter or spirit of the present Constitution of this State.

Error to the Circuit Court for Orange county.

Moses E. Barber and others were jointly indicted by the grand jury for Orange county at the Fall term of the circuit court, 1869, for the false imprisonment of one George Bass. The body of the indictment is as follows: "Orange County, to-wit: The Grand Jurors of the State of Florida, empanelled and sworn to inquire and true presentment make in and for the body of the county of Orange aforesaid, upon their oath do present that Moses E. Barber, Moses F. Barber and Thomas Johnson, all late of the county of Orange, laborers, on the nineteenth day of August, in the year of our Lord one thousand eight hundred and sixty-eight, at the county and State aforesaid, did forcibly confine and imprison within this State, against his will, one George Bass, of county and State aforesaid, contrary to the statutes in such case made and provided, and against the peace and dignity of the State of Florida."

The defendant was separately arraigned at a special term held in July and pleaded not guilty to the indictment and was then tried and found guilty by a jury, and by his counsel moved in arrest of judgment upon several grounds, one of which was that no offence is charged in the indictment.

The motion was overruled and the defendant excepted. The court sentenced the prisoner to imprisonment in the penitentiary for the term of one year.

The defendant then prosecuted a writ of error from this court.

Fleming & Daniel for Plaintiff in Error.

A. R. Meek, Attorney General, for the State.

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Mr. Justice HART was not present at the hearing of this case.

RANDALL, C. J., delivered the opinion of the court.

The laws of 1868, p. 68, § 43, provide as follows: "Whoever, without lawful authority, forcibly or secretly confine or imprison another person within this State against his will, and confines or inveigles, or kidnaps another person, with intent either to cause him to be secretly confined or imprisoned in this State against his will, or to cause him to be sent out of this State against his will, and whoever sells, or in any manner transfers for any time, the services or labor of any other person who has been unlawfully seized, taken, inveigled or kidnapped from this State to any other State, place or county, shall be punished by imprisonment in the State penitentiary, not exceeding ten years."

This indictment fails to charge in the language or spirit of the statute that the act done was "without lawful authority," and therefore no offence is alleged under this statute. There are other defects alleged in the indictment, but it is unnecessary to notice them in disposing of this case. The fact charged comes short of being a misdemeanor at common law. The motion in arrest of judgment should have been granted.

There are, however, several questions presented by the record, which in our judgment ought to be noticed in disposing of this case, and we will proceed to notice such of them as are deemed important.

The 3d error assigned is, that "the court refused to grant a continuance on motion and affidavit at the special term in July, 1869." It is unnecessary to consider the sufficiency of the affidavit in disposing of this case. The correct rule as understood by this court is contained in the case of *Gladden vs. The State*, 12 Fla., 562, 571.

The 4th error alleged is, that "the court refused to grant a change of venue on motion and affidavit." The statute

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requires that the court on application for a change of venue shall be *satisfied* that a fair trial cannot be had in the county where the offence is alleged to be committed. An affidavit of the defendant or other persons that *they* are satisfied, is not sufficient. Facts must be stated and the court must be satisfied judicially. No facts or reasons are stated in the affidavit, and there was, therefore, nothing upon which the court could exercise its judgment. We express no opinion as to the power of this court to review the action of the Circuit Court in the exercise of discretion in matters of this character.

The 5th ground of error is, that "the court on the trial of said cause refused to allow jurors to be challenged peremptorily by defendant's counsel, after challenging for cause." The law provides that each party in civil causes shall be entitled to three peremptory challenges of jurors empanelled in any cause, and that every person arraigned for any offence shall be entitled to the same challenge allowed in civil causes. In empanelling the jury in this case, it appears that three persons called as jurors were challenged for cause by the defendant, and being examined on oath by the court as to their qualifications, were pronounced competent jurors. The defendant then challenged each of them peremptorily, and the court ruled that they could not be challenged peremptorily after being challenged for cause, to which ruling defendant excepted. In some of the States it is held that after a challenge for cause, the defendant cannot challenge peremptorily, upon the ground that when the party has challenged for cause and submitted the matter to the court he has waived the right of further challenge. In Massachusetts it is held in capital cases, that a peremptory challenge must be exercised if at all, before the jurors are examined as to their bias or opinions. In other States it is held that a prisoner may challenge for cause, reserving his right of peremptory challenge.

No reason is ever required for exercising this right. Black-

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stone in his Commentaries (v. 4, p. 353,) says these challenges are allowed on two reasons. "1. As every one must be sensible what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another, and how necessary it is that a prisoner should have a good opinion of his jury, the want of which might totally disconcert him, the law wills not that he should be tried by any one man against whom he has conceived a prejudice even without being able to assign a reason for his dislike. 2. Because upon challenges for cause shown, if the reasons assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may provoke a resentment, to prevent all ill consequences from which the prisoner is still at liberty, if he pleases, peremptorily to set him aside."

It has been held by the Supreme Court of this State, 9 Fla., 215, that the right of peremptory challenge may be exercised at any time before a juror is sworn in accordance, with the rule in Virginia in the case of Herrick vs. Com. 5 Leigh, 708, in which it was held that a prisoner might even retract his election of a juror and challenge him peremptorily.

Without committing ourselves to this extreme view, we are very clearly of the opinion that the Judge of the Circuit Court erred in refusing the right of peremptory challenge after challenge for cause, considering the rule and the reasons for it as given by Blackstone to be the correct and proper ones under our statute, which gives the *right* to challenge peremptorily a given number of the jurors empanelled. See *People vs. Bodine*, 1 Denio, 281; 12 Wheaton, 480.

The 6th error assigned is, that "the court refused to admit the testimony of Wm. E. Roper, offered by defendant's counsel to prove Francis Foster was not a competent juror on the trial of said cause."

The law of 1868, (p. 20 § 24,) expressly provides that the person offered as a juror may be examined on oath respecting

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his competency and indifference as a juror, "and the party objecting to the juror may introduce other competent evidence in support of the objection." It is, therefore, the duty of the court to hear any competent evidence in support of a valid objection, and the judge erred in his ruling in this respect.

The 8th error assigned is, that "the court refused to permit defendant's counsel on cross examination of the State witness George Bass, (named in the indictment,) to ask the question, "Whose cattle were you driving?" The question doubtless related to the circumstances attending the unlawful imprisonment for which the defendant was indicted, and was asked with a view of showing that the prisoner was committing an offence at the time of his alleged unlawful arrest by the defendant and others. The question was objected to by the State attorney and the objection sustained. The witness did not object on the ground that the answer might criminate him. If the answer would tend to show that the witness was committing a crime at the time of his arrest by the defendant, it certainly was material to the defence, and the defendant was entitled to show the circumstances under which the arrest was made, not only in respect to the question of guilt, but also with respect to the punishment that might be inflicted upon him if convicted. Any person may arrest another who is in the act of committing an offence, for the purpose of taking the offender before a magistrate. Wharton's Cr. Pl. and Pr., 88, 97; 5 Cushing, 281; Archb. Cr. Pl., 266.

The 15th alleged error is, that "the court charged the jury that the statement of defendant is not evidence, and that they could not take such statement into consideration as evidence." It appears that the defendant was permitted by the court to make a statement of his defence on oath before the jury.

The act of 1865, "An act concerning Testimony," sec. 4, says, "In all criminal prosecutions the party accused shall

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have the right of making a statement of the matters of his or her defence, under oath, before the jury, when in the opinion of the court the ends of justice shall so require."

We think the court erred in its instruction to the jury. The law provides that the defendant may, with leave of the court, make his statement on oath *before the jury*. The court is to judge whether in his opinion the ends of justice may be promoted by allowing the defendant to make such statement. There was some purpose to be subserved more than the mere amusement of the jury, in allowing the statement to be made. It is the jury alone who are entitled to consider the statement, and if it be remarked upon at all, it should be to suggest to the jury in effect, that they are to attach to it such importance, in view of the nature of the offence charged, and of the testimony before them, as in their good judgment it is entitled to. It is for their consideration alone, and they may disregard it entirely. The act was passed at a time when the jury were authorized to affix the penalty on conviction, and was doubtless designed to perform one of the purposes of the answer of a prisoner after verdict of guilty to the court in response to the customary question, "What have you to say why the sentence of the law should not be pronounced?" With this change in the law giving to the court the right to prescribe the punishment within certain limits this statute of 1865 remains, and the defendant is entitled, when permitted to make the statement, to the benefit or disadvantage of such impression as he may be able to make upon the judgment of the jury.

16th error. The court (on request of the State Attorney,) charged, "that if the jury find from the evidence that if a person was forcibly imprisoned or confined without legal authority, against his will, and that it was *within this State*, then it is your duty to find him guilty." We have already seen that the offence must be shown to have been committed within the jurisdiction of the court before which the

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indictment was found. It is evident that the language of the whole of this part of the charge is too vague, and strictly construed may have meaning entirely opposite to that intended.

The 21st ground of error is, that the special term of the Circuit Court for Orange County at which this cause was tried, was not a legal term of said court.

It was urged that the law authorizing the holding of extra and special terms of courts to be appointed by the judges, (acts of 1866 p. 27,) is unconstitutional. The Constitution of the State in force when that law was passed, provided that "a Circuit Court shall be held in such counties, and at such time and places therein as may be prescribed by law." The act of 1866 authorized the judges to order and hold extra and special terms of said courts, whenever in their judgment the public welfare and cause of justice require the same." The Constitution of 1868, art. VI, sec. 7, says, "such judge shall hold two terms of his court in each county within his circuit each year, at such times and places as shall be prescribed by law." There is little difference in the language of the former and present constitutions, the latter requiring that there *shall be two* terms held in each county, and the former not containing this requirement. There is nothing in the words of the latter either expressly or impliedly limiting the number of terms to two in each county, but it requires that two terms *shall* be held at the times to be named by the Legislature. There are no negative words or words of limitation or restriction, and looking at the former Constitution and the law as it stood at the time of the framing of the present Constitution, it is probable that if it had been intended to limit the power of the Legislature, or to abrogate the former law, the framers would have employed language expressing that intention. Looking at this matter in this view, and knowing that the administration of justice some times requires the holding of terms of court on other occasions than those permanently appointed by law,

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we conceive that it is within the power of the Legislature to provide for the holding of additional terms of the Circuit Courts at such times as may be deemed by the judges that the "public welfare and cause of justice requires the same."

As it does not appear that there was any irregularity in the convening of the court at the time of the trial of this case, we must hold that this error is not well assigned.

For reasons first above stated, the judgment of the Circuit Court must be arrested and this cause remanded with directions to quash the indictment.

CHARLES H. WATERMAN VS. THE STATE OF FLORIDA.

Error to Circuit Court for Orange County.

Fleming & Daniel for Plaintiff in Error.

Attorney General for the State.

RANDALL, C. J., delivered the opinion of the court.

All the material questions arising upon this record were considered and decided in the case of Barber vs. The State, at the present term, with the exception that the indictment in this case is not subject to the same objections.

This indictment is for an unlawful imprisonment, and is drawn in conformity to section 43, chapter 3 of an act to provide for the punishment of crimes, &c., approved Aug. 6, 1868, and charges an offence under that law.

For reasons given in the opinion of the court in Barber vs. The State, where precisely the same question arose upon the trial, it is considered that there was error in the proceedings and judgment in this case, and the judgment must be reversed and a new trial granted.

APPENDIX.

OPINIONS

OF THE

SUPREME COURT

OF THE

STATE OF FLORIDA,

RENDERED TO

HIS EXCELLENCY THE GOVERNOR,

IN THE YEARS A. D. 1870-'1.

OPINIONS
RENDERED TO HIS EXCELLENCY THE GOVERNOR
IN THE YEARS A. D. 1870-'1.

IN THE MATTER OF THE EXECUTIVE COMMUNICATION OF
THE 2D DAY OF JUNE, A. D. 1870, RELATING TO COUNTY
OFFICERS, THEIR COMPENSATION, &C.

1. State officers, in a general sense, are officers whose duties and powers are co-extensive with the territorial limits of the State. County officers, in the same sense, are those whose general authority and jurisdiction are confined within the limits of the county in which they are appointed, who are appointed in and for a particular county, and whose duties concern more especially the people of that county.
2. The "support" of an officer is derived from the emoluments of his office, which consist of fees or per diem. Each county must pay the fees or per diem provided by law for its officers.
3. Wherever the constitution imposes a duty upon a county, the county must pay the compensation of all officers employed in the discharge of the duty imposed, as well as all expenses incident thereto.
4. In all cases where there is no constitutional provision making an expense chargeable to the county, it must be for a county purpose in order to justify the legislature in authorizing a county to resort to taxation to defray it.

SUPREME COURT ROOM,
Tallahassee, June 6, 1870. }

To his Excellency HARRISON REED, *Governor*:

The communication of your Excellency, under date of the 2d inst., requiring an opinion of the Justices of this Court upon certain matters embraced in a resolution passed by the Legislature, was received on the day of its date. The absence of one of the members of this court has prevented an earlier compliance with the request.

Opinion of Randall, C. J.—County Officers.

Three questions are presented by your communication, as follows:

I. What class of expenses is required by the constitution to be paid by counties?

II. Who are "county officers" within the meaning of the constitution? And,

III. What legislation is necessary to carry into effect the provisions of the constitution relating to the payment by counties of their legitimate expenses?

I. It may be difficult to enumerate in detail the various kinds of expenses which are required to be paid by counties.

Sec. 6 of Art. XII requires the Legislature to "authorize the several counties and incorporated towns in the State to impose taxes for county and corporation purposes."

Sec. 18 of Art. XVI says: "Each county and incorporated city shall make provision for the support of its own officers, subject to such regulations as may be prescribed by law. Each county shall make provision for building a court house and jail, and for keeping the same in good repair."

"County purposes" necessarily includes what is intended by the phrase "the support of its own officers," and the building of a court house and jail. The term, county purposes, may also embrace the payment of the legitimate indebtedness of the counties, the construction of roads and bridges, and public works of common necessity and convenience, the expenses of various servants and agents of the counties in the management of county affairs, the maintaining of the internal police and good order of the community, public schools, and such other matters of public concern as may peculiarly effect the people of the county in their property and local interests, and may be provided by the Legislature within the scope of its authority.

A county organization commonly includes the establishment of such various county officers as may be necessary to accomplish the purposes and execute the powers of the county. These organizations, and the powers and duties of

county officers, are quite uniform in the various States, as is well understood by all our citizens.

The provisions of our constitution upon these matters are practically identical with those of the constitution of other States, and the matters above mentioned, and kindred subjects, are committed to the local governments on account of convenience and economy.

The word "support" is construed to refer to the *earnings* and *fees* to which the officers may be entitled for performing public duties. To support means "to sustain, to supply funds for the means of continuing, as to support the expenses of government." (*Webster*.) We have little difficulty in determining the meaning of the word in relation to the support of the officer of a city; there can be no doubt as to its application.

II. Who are "county officers" within the meaning of the constitution?

That instrument speaks of State officers, county officers, and municipal officers. All of them are officers, of this State, and all take the same oath of office. Their character, as State or county or municipal officers, is not determined by the manner in which the offices are filled. Some of them have the prefix of "county," as "county judge," &c. This is no more a test than would be the word "State" attached to an office, the functions of which pertain to a territory greater than a county. When State officers are mentioned, we at once understand a reference to those officers whose duties and jurisdiction are not confined to the locality of a county; and we understand county and city officers to be those whose duties are confined to the territory of a county or city, and are local in their character.

The constitution says that the Government shall appoint, "in each county," an assessor of taxes, a collector of revenue, a county treasurer, county surveyor, superintendent of schools, county commissioners, a sheriff and clerk of the circuit court, who shall be clerk of the county court and

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board of county commissioners, recorder and *ex-officio* auditor of the county. Constables shall be elected "in each county." "The Governor shall appoint a county judge for each county." If the prefix "county" were held to be the criterion by which to determine whether it be a county office, we should have as county officers only a county treasurer, county surveyor, county commissioners, and a county judge. With only these officers, it strikes me that there could be no complete county organization, and the other offices are perhaps indispensable to make the necessary machinery complete and efficient.

What is a sheriff? We must define terms used in a constitution or statute by the rules of the common law, unless the constitution or statute gives us another rule. The very word here defines itself. The derivation of the word sheriff, from the Saxon, attests the antiquity of the office. The sheriff was, in Saxon times, the *reeve* or bailiff of the *shire*, and during the Anglo-Norman period, acted as the deputy of the Count or Earl, (*comes*,) who had the government of the county. Hence his title in Law Latin of *vice-comes*, and in Law French, *viscount*, that is, the Count's or Earl's deputy. The English shire-reeve has contracted into sheriff.—*History*.

In England as in the United States, he executes civil and criminal process throughout the county, and has charge of the jails and prisoners, attends courts, and keeps the peace. His duties pertain in this State to affairs within his county, and whenever he desires to serve process or arrest an offender in another county, the process must be endorsed by some judicial officer in the other county. Th. Dig., 520.

Sheriffs may summon the citizens to aid him in some instances, and this is the *posse comitatus* or power of the county. The laws of this State, in several instances, speak of this officer as the "sheriff of the county." Th. Dig., 60. The sheriff of the Supreme Court must be the "sheriff of

the county” where the court is held. Th. Dig. and Laws of 1868.

When a prisoner is convicted and sentenced to the penitentiary, the law may authorize the sheriff, or any other person, to convey the convicts to the penitentiary. That the sheriff may perform the service and get his pay from the State will not divest him of the character of a county officer.

The offices of collector and assessor are provided for each county, and they are necessary offices for each county, and the county government cannot be maintained without these, or equivalent officers. State and county taxes are assessed upon the same property, and economy and convenience require that the State and county taxes shall be collected by the same person. That the collector gathers the State taxes and pays them to the State Treasury does not make him a State officer so as to divest him of the character of a county officer, although the compensation for his services comes out of the taxes he may collect. It can make no difference how he may be paid; his fees come out of the people of the county in any event. Nor is it *necessary* that the law shall require him to perform an annual pilgrimage to the Comptroller’s office, for if the law should provide that he make settlement with the county treasurer, and that the State moneys should be transmitted by any of the convenient methods known to business men, with a view to economy, much expense might be avoided. I cannot see that the law which compels him to perform a labor not necessary to the office, makes him other than a county officer.

Mayors of cities, county judges, and justices of the peace, issue all their writs in the name of the State, and act “in the name and by authority of the State,” but I cannot admit that this makes them other than county or local officers. I conclude that a county officer is one which is usually provided in the organization of counties and county governments, whose duties pertain and are limited to the territory

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of a county and to the local and domestic concerns before mentioned.

III. The legislation necessary to carry into effect the provisions of the constitution relating to the payment by the counties of their legislative expenses, is some provision, if none now exists, regulating the manner of proving claims against a county, and of inquiring into their correctness, authorizing the auditing officers to reject claims not equitable, and providing the means of paying just debts.

The plan of paying at the capital all the expenses of local governments originated at a time when the United States furnished the means of maintaining the territorial government. A more economical method is required under the constitution, whereby the local authorities, composed of persons likely to be familiar with local affairs, may, with watchful care, defend and protect their own interests against the fraudulent practices, sometimes alleged, of imposing upon the auditing officer of the State, without the possibility often of his determining upon the justness of claims presented in due form, but which might, without inconvenience, be more thoroughly investigated by persons acquainted with the circumstances and the origin of each claim. This purpose, I believe it to be the design of the provisions of the constitution, relating to the subject, to effect.

Respectfully submitted.

E. M. RANDALL, C. J.

TALLAHASSEE, FLA., *June 6, 1870.*

SIR:—Your communication enclosing a resolution of the Assembly and Senate, and making certain enquiries which you are in this resolution requested to make, is received. The matter involves three points—

First. Who are county officers within the meaning of the constitution? Sec. 18, Art. XVI.

Opinion of Westcott, J.—County Officers.

Second. What class of expenses is required by the constitution to be paid by the counties?

Third. What legislation is necessary to carry the constitutional provisions on this subject into effect?

The section and article of the constitution which has reference to the support of county officers, provides that each county shall make provision for the support of its own officers, subject to such regulations as may be prescribed by law. Under this section two questions arise—

First. Who are county officers?

Second. What is meant by the terms “shall make provision for the support of its own officers?”

Officers under the provisions of the constitution are divided into three classes—State, County and Municipal, but there is no clause in the constitution expressly designating the class to which each officer may belong, and we are therefore left to determine this question from the general character of other constitutional provisions having a bearing upon the subject, the common law classification of offices, the decision of courts of other States having similar constitutional provisions, the practice and expressed views of the legislative department of the government of such States, and from the functions and character of county organizations.

What is the test by which we are to determine whether an officer is a county officer within the meaning of this clause of the constitution, where the office is created by the Constitution?

It is clear that the source from which the commission emanates cannot be the test, for under the Constitution “all grants and commissions must be in the name and under the authority of the State of Florida,” (Sec. 13, Art. V,) and neither the county, nor any officer of the county, or any other authority within the county, can confer the franchise of, or create an office, (Sec. 27, Art. IV,) nor can the people of a county create an office as their power extends to simple

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selection under an act of the Legislature prescribing the duties of the office and providing for the election of the officer by the people.

In respect to the source from which their power and authority are derived, all officers are therefore officers of the State. This, therefore, cannot be the test, as there would be no county officers if it was, and this would be inconsistent with the Constitution which recognizes such a class of officers.

The term "State officers" occurs in Sec's. 17, 21 and 23 of Art. XVI, and in each section refers to officers whose duties and powers are coextensive with the State. The only clause in which the term "county officers" occurs in reference to officers provided by the Constitution is Sec. 12, Art. XVI, which declares that "all county officers shall hold their respective offices at the county seat of the counties." It is evident that the test by which to determine whether an officer is a county officer within the meaning of this clause, is the territorial extent of his powers and nature of his appointment and duties, and that all officers whose general authority is confined within the limits of the county, and who are appointed in and for such county, and whose duties concern the people of that county, are county officers. Is this the general test to determine whether an officer is a county officer within the meaning of the section providing for the support of the county officer?

I have no doubt that where the constitution designates the party as a county officer, and his authority extends throughout the limits of the county, and his duties appertain to the county, he is a county officer. This is the case with the county treasurer, county surveyor, county commissioners and county judge.

There is no difficulty in arriving at this conclusion, for if these two things combined do not constitute him a county officer, then I am unable to see that there are any county officers, which as a matter of course cannot be, as the Con-

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stitution expressly recognizes such class. At common law, in so far as any such classification as county officer existed, it embraced such officers as have jurisdiction, powers or duties not extending beyond the limits of the shire or county. Such was the case of the sheriff or *vice-comes* and other like officers. This clause, and indeed much of the present Constitution is taken from the Constitution of the State of Nevada. In that State the officer discharging similar duties to that of the judge of the county court is deemed a county officer. So, also, is the sheriff of the county recognized as a county officer by the decision of the Supreme Court of the State, as well as by the uniform action of the Legislative Department of the Government in the matter of appropriations.

The Supreme Court of Iowa classifies a justice of the peace as a county officer; county judges, clerks and sheriffs, are deemed county officers under the constitution of Illinois, and in all of the other States in which I can find any allusion to the question, and where the constitution recognizes the distinction between county and State officers, the general test is as stated. It is not intended by this to say that there cannot be State officers whose authority is exercised within county lines. Such are officers of the Penitentiary. They are unquestionably State officers, in every sense that they are officers, and yet their authority is in most if not all cases confined to the locality. These officers are not appointed in and for any particular county, nor are the offices such as are local in their character, that is to say, they are offices by no means attached to a county, but might be located as well in one county as another, nor do the duties attached to them appertain to the people of one county more than to the people of another.

For the reasons stated, I concur in the conclusion reached by Chief Justice Randall, as to who are county officers.

There is but one other view which could be taken of this question, and that is, that where an officer acts for the coun-

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ty he might be considered as to that service a county officer, and where he acts for the State he might be considered as to that service a State officer. I was first inclined to this view, but I find no authority for such a conclusion in the Constitution, and it is certainly not in conformity to the prevailing view in other States having like constitutional provisions. A sheriff everywhere executes process for the State in criminal prosecutions, but he is nevertheless classed as a county officer, and many of the officers designated by name as county officers perform duties of the most important character, which relate to the assessment and collection of State revenue, and receive their compensation from the county; such is the case with county commissioners.

As to the second question, what is meant by the terms "make provision for the support" of the officer?

The support of an officer is derived from the emoluments of the office, and these emoluments under the Constitution consist of fees or per diem. The result is, therefore, that the counties shall make provision for the fees or per diem of these officers.

What class of expenses are *required by the Constitution* to be paid by the counties, is the next question. As a matter of course, they must pay the fees or per diem of officers just alluded to. In addition, whenever the Constitution imposes a duty upon a county, then the county must be at the expense of discharging that duty both in the matter of the fees or per diem of such officers as may be created by law to perform that duty, as well as other expenses incident to the discharge of the duty.

Sec. 3, Art. X, imposes a duty upon the counties to provide for those of the inhabitants who by reason of age or infirmity, or misfortune, may have claims upon the aid and sympathy of society. Sec. 8, Art. VIII, provides that each county shall be required to raise annually by tax funds for the support of common schools. Sec. 18, Art. XVI, provides that each county shall make provision for building a

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court house and jail, and for keeping the same in repair. All persons engaged by the county, whether as officers or employees, in the discharge of these duties, and all expenses incident thereto, are expenses to be borne exclusively by the counties.

Aside from these provisions, the Constitution in reference to the counties does nothing more than provide that the Legislature shall authorize the several counties to impose taxes for county purposes and for no other purpose. This provision restricts the powers of the Legislature and gives as a rule to determine what, (in addition to the expenses already mentioned,) class of expenses should be borne by the county.

I shall not attempt to state in detail what constitutes "county purposes," as I presume all that is desired is the expression of a general view.

The last question is what legislation is necessary to carry the Constitution into effect in these respects.

It must be obvious that it is not part of judicial duty to suggest to the Legislature what may be a proper exercise of legislative discretion; any legislation which is conformable to the views expressed herein, will accomplish the end desired. To determine what safeguards should be desired for the safe custody and disbursement of public moneys for the economical administration of the State or county government, and other matters of like character, involves neither an interpretation of any portion of the Constitution, nor is it a question of law, and I deem it unnecessary to say anything further in reply to this branch of the resolution.

Very respectfully,

JAS. D. WESTCOTT, Jr.,

Associate Justice Supreme Court.

To his Excellency HARRISON REED,

Governor of Florida:

Opinion of Hart, J.—County Officers.

OFFICE OF THE JUSTICES OF THE
SUPREME COURT OF THE STATE OF FLORIDA, }
Tallahassee, June 7th, 1870.

In the matter of the inquiries of his Excellency the Governor as to

First—What class of expenses is required by the Constitution to be paid by the counties?

Second—Who are county officers within the meaning of the Constitution?

Third—What legislation is necessary to “carry it into effect?”

I am of the opinion that though all the officers in the State are created directly or indirectly by State authority, and their duties, responsibilities and compensation prescribed, regulated and controlled by it, yet county judges, county treasurers, county surveyors, clerks of the courts, county commissioners, justices of the peace, sheriffs, constables, coroners, tax assessors and collectors, and such others as are or may be so designated by statute, by name or otherwise, are made county officers. In Sec. 12, Art. XVI, the words “county officers” are used; also in Sec. 18 of the same Article. In Sec. 6 of Art. XI, the words “county purposes” are used, and elsewhere the words “county government;” Sec. 21 of Art. XIV. Purposes and government cannot be accomplished without officers. The Constitution names and designates some of them, and prescribes the duty and authority to create others and regulate their functions, and the duty to provide for their support.

The class of expenses required to be paid by the counties are,

1st. Education. See Sec. 8 of Art. VIII. The needed legislation in order to carry out this provision is, that a statute should prescribe when, how, by whom, and upon what property this tax should be levied, collected, paid over, and vouched, and the fees of the officer for performing the duties.

2d. The unfortunate. See Sec. 3 of Art. X. Legislation

• Letter of the Governor—Public Works.

should prescribe times and manner of performing the whole of this duty.

3d. County purposes. See Sec. 6 of Art. XII, and Sec. 18 of Art. XVI. Legislation should prescribe the times and manner of performing all those duties.

Very respectfully,

O. B. HART,
Associate Justice Supreme Court.

IN THE MATTER OF THE EXECUTIVE COMMUNICATION OF
THE 6TH OF FEBRUARY, A. D. 1871.

Article V, Sec. 16, of the Constitution of the State of Florida provides that "the Legislature shall have power to provide for issuing State bonds, bearing interest, for securing the debt of the State, and for the erection of State buildings, support of State institutions, and perfecting public works." *Held*, That the term "public works" refers to the incomplete system of internal improvements authorized by an act to encourage a liberal system of internal improvements, approved January 6, 1855. The internal improvements designated by this act, as proper subjects of State aid, and which were not perfected or completed at the time of the adoption of the Constitution of 1868, are the public works to perfect which the Constitution empowers the Legislature to issue bonds.

To the Honorable E. M. Randall, Chief Justice of the Supreme Court of the State of Florida:

SIR:—By Section 16, Article 5, of the Constitution, I may require the opinion of the Justices of the Supreme Court upon any point of law:

Under this constitutional provision, I have the honor to ask the opinion of the Supreme Court upon the following points of law.

First. Section 7, Article 12, of the Constitution of the State of Florida reads: "The Legislature shall have power

 Opinion of Westcott, J.—Public Works.

to provide for issuing State bonds, bearing interest, for securing the debt of the State, and for the erection of State buildings, support of State institutions, and perfecting public works."

Second. The Legislature, at the third General Session, passed laws to aid certain railroad corporations, declaring them to be public works, and expressing their intention "to aid in perfecting one of the public works embraced in the internal improvements of the State." (See 3d Session, Laws 1870, pages 10, 50 and 54.)

Third. Has the Legislature power to declare what are "public works?" Are railroads "public works" referred to by the constitution, and has the Legislature power under our constitution to aid in the construction and completion of these public works?

HARRISON REED,
Governor of Florida.

Tallahassee, Feb. 6, 1871.



SUPREME COURT OF FLORIDA,
Tallahassee, Florida, Feb. 11, 1871. }

His Excellency HARRISON REED,
Governor of Florida, Tallahassee:

SIR:—Hon. E. M. Randall, Chief Justice of the Supreme Court of Florida, has forwarded to me from Jacksonville a copy of your communication of the 6th, addressed to him, in which you require the opinion of the Justices of the Supreme Court as to the interpretation of Section 7, Article 12, of the Constitution of this State. This section is as follows: "The Legislature shall have power to provide for issuing State bonds, bearing interest, for securing the debt, and for the erection of State buildings, support of State institutions, and perfecting public works."

Your questions are asked with reference to the provisions of an act entitled an act to perfect the public works of this

State, approved June 24, 1869, and, if I understand them, may be reduced to one question; that is, whether railroads, and what railroads, are included in the term "public works," as used in the section quoted above?

The question here to be answered differs very materially from the question which arises under acts of the Legislature passed under a constitution where there is no express inhibition authorizing townships, counties, or cities to pledge their credit or impose taxes to assist in the construction of railroads. So also does it differ to some extent from the questions which would arise under an act of the Legislature where the constitution did not expressly prohibit it imposing taxes for the construction of a railroad to be the property of the State. In the cases just mentioned, the act of the Legislature must be sustained, if at all, by virtue of the general power of the Legislature of a State to determine what are proper objects to be aided by the expenditure of public money, which acts of the Legislature are generally admitted to be constitutional, and within the powers of the legislative department of the government, if the end to be accomplished is public as contra-distinguished from private—is a public purpose rather than a private one. In this connection, and before entering into a discussion of the general subject, it is not inappropriate, in order to a thorough understanding of this question, to inquire why it is that the Legislature cannot exercise the power of taxation, or which is the same thing in principle, pledge the credit of the State for a strictly private purpose or use? It is not because of the doctrine that private property cannot be *taken* except for public use, for a taking within the meaning of this, an elementary principle of a republican government, is a taking altogether—an entire change of ownership. 6 Whar., 46; 1 W. & S., 225; 6 ib., 116; 1 Barr., 312; Pick., 418; 7 ib., 344; 9 Harr., 166. Besides, if the imposition of a tax is such a taking, then the result is that there can be no taxation without compensation, and that would involve a repay-

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ment to the party of the same amount, and the State would realize nothing. The reason is because such action would amount to a decree of confiscation, not to go to the government but to some private person. A law giving the property of A to B for a private end, or taxation for a strictly private purpose, would be an exercise of a power not legislative. It would be the exercise of judicial power, a judicial judgment by which the property of one man would be transferred to another, the Legislature undertaking to determine that the party to receive was entitled to it as against the party having it, without reference to any public benefit or use.

In the matter now before us, it is not necessary that I should express any opinion as to the general powers of the legislative department of the government. We are not to determine whether the judiciary, in the absence of constitutional restrictions upon legislative power, can create restrictions upon that power, upon the ground that the provisions of an act are inconsistent with the spirit of our institutions, or it impairs some of those rights which it is the object of free government to protect. Such a question as is claimed is presented when the Legislature authorizes a city to tax its citizens to construct a railroad not running within its corporate limits and owned principally by individuals.

It becomes my duty here to define an express grant of power by the constitution to ascertain its true meaning, and particularly to determine what is the meaning of the words "perfecting public works" in the connection in which they stand, and whether they embrace railroads. While it is apparent, therefore, that there is a great difference between this question and the questions involved in a case where the Legislature under its general powers has authorized the people of a county or city to tax its inhabitants to aid in constructing a railroad, yet it cannot be denied that great aid may be derived in determining the meaning of the word "public," as used in the express grant of power, from the

signification and meaning given to that word by courts where the Legislature under its general powers has undertaken to authorize taxation for certain works, such as the construction of a railroad. I have found no case in which a court goes so far as to hold that where there is no constitutional inhibition, the Legislature could not resort to taxation or to a pledge of the credit of the State, to secure the construction and operation of a railway owned by the State and affording facilities of transportation to the people of the State. On the contrary, persons at all familiar with the early history of the leading commercial States of the Union, will remember that it was deemed true policy that the States should supply facilities to the public by railway, canal and otherwise; such was the practice of New York, Pennsylvania, Virginia, and other States. Where the road is owned by the State there can be no doubt that a railroad would be a public work, as it would not be liable to the usual objection that it was owned by individuals, and that private parties realized all its gains and suffered its losses. Where, however, the railway is owned by individuals, some, I think three, or the courts, in cases where the Legislature has authorized the people of a county or city to subscribe for stock, have held that to justify taxation the purpose must be a public one, and that such works are not public in the sense which justifies a resort to taxation for their construction by municipalities or counties, but that they are private enterprises operated for private benefit, and that it is not within the power of the Legislature to authorize a levy of taxes by a county or town to construct railroads owned by private parties.

In the State of Michigan it has been held that they are not public in the sense which authorizes taxation, and the power to take private property for their use is justified as a proper "police power," by which the abstract right of a person to use and control his property is made to yield to the "superior interest of the public, under the guise of a conve-

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nient fiction which treats a corporation managing its own property for its own profit as merely a public convenience and agency." According to the prevailing doctrine upon this subject, a corporation exercised the power of taking private property by virtue of what the courts deem strictly an exercise of the power of eminent domain, and that involves the idea that the taking is for *public use*. If such power can be properly granted to a corporation, this is no doubt the true doctrine upon which to base it. It is the generally accepted theory, and in my judgment, the correct one. There is no necessity to resort to "*a convenient fiction*" to declare that "a public convenience and agency" which is in fact so. If there is such a peculiar power and "convenient fiction" as makes a railroad a public convenience and agency to take the property of the citizen against his will, why cannot the same peculiar power and convenient fiction be called into existence and make it a public use or purpose so as to justify the imposition of a tax which simply imposes a burden? While I think three of the Supreme Courts of the States agree in this conclusion announced by Judge Cooley, the adjudications of sixteen States of the Union pronounce such acts of the Legislature constitutional. The Circuit Courts of the United States have, without hesitation, made a like decision, and the Supreme Court of the United States, in referring to these adjudications, has approved them in the strongest language, remarking that many of the opinions are marked by the profoundest legal ability and are sustained by reason and authority.

I do not deem it inappropriate in this connection to refer to the language of some of the courts in discussing this subject. The Supreme Court of New York remarks that "internal improvements may be constructed by general taxation, and in case of local works by local taxation, or the State may aid in their construction by becoming a stockholder in private corporations, or authorize municipal corporations to become such stockholders for that purpose.

Railways are public works, and may be constructed by the State or by corporations." The Supreme Court of Michigan draws a distinction between public works and private enterprises having a "public aspect." Chief Justice Cooley, for the court, uses this language: "I have said that railways are often spoken of as a species of public highways. They are such in the sense that they accommodate the public travel, and that they are regulated by laws, with a view to preclude partiality in their accommodations. But their resemblance to the highways which belong to the public, which the people make and keep in repair, and which are opened to the whole public to be used at will, and with such means of locomotion as trade or pleasure or convenience may dictate, is rather fanciful than otherwise, and has been made prominent, perhaps, rather from the necessity of resorting to the right of eminent domain for their establishment than for any other reason. They are not, when in private hands, the people's highways, but they are private property whose owners make it their business to transport persons and merchandise in their own carriage, over their own land, for such pecuniary compensation as may be stipulated. These owners carry on for their own benefit a business which has indeed a public aspect, inasmuch as it accommodates a public want, its establishment is consequently in a certain sense a public purpose. But it is not such a purpose in any other or different sense than would be the opening of a hotel, the establishment of a line of stages, or the putting in operation of a grist mill, each of which may, under proper circumstances, be regarded as a local necessity, in which the public may take an interest beyond what they would feel in other objects for which the right to impose taxation would be unquestionable."

These objections were urged in the Pennsylvania cases, (21 Penn. State, 166, 187;) and Chief Justice Black there states the views of that court in the following language: "It has been argued, and here perhaps is the strain of the

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case, that this will be taxation for a private purpose because the money levied will be in effect handed over to a private corporation. I have conceded that a law authorizing taxation for any other than public purposes is void, and it cannot be denied that a railroad company is a private corporation. But the right to tax depends on the ultimate use, purpose, and object for which the fund is raised, and not on the nature or character of the person or corporation whose intermediate agency is to be used in applying it. A tax for a private purpose is unconstitutional, though it pass through the hands of public officers, and the people may be taxed for a public work, although it be under the direction of an individual or private corporation. The question, then, is whether the building of a railroad is a public or a private affair. If it be public it makes no difference that the corporation which has it in charge is private. A railroad is a public highway for the public benefit, and the right of a corporation to exact a uniform, reasonable stipulated toll from those who pass over it does not make its main use a private one. The public has an interest in such a road when it belongs to a corporation, as clearly as they would have if it were free, or as if the tolls were payable to the State. It is a grave error to suppose that the duty of a State stops with the establishment of those institutions which are necessary to the existence of government, such as those for the administration of justice, the preservation of the peace, and the protection of the country from foreign enemies. To aid, encourage, and stimulate commerce, domestic and foreign, is the duty of the sovereign as plain and as universally recognized as any other. It was a commercial restriction which caused the revolution. Canals, bridges, and roads, and other artificial means of passage and transportation from one part of the country to the other, have been made by the sovereign power and at the public expense in every civilized State of ancient and modern times. It being the duty of the State to make such public improvements, if she happen

to be unable or unwilling to perform it herself to the full extent desired, she may accept the voluntary assistance of an individual or a number of individuals associated together as a corporation. If the making of a railroad is a public duty which the State may do entirely at the public expense, or cause to be done entirely by a private corporation, it follows that such a work may be made partly by a State and partly by a corporation, and the people may be taxed for a share of it as rightfully as for the whole." Just here it may be remarked that if the terms "public works" embrace railroads, and the State should issue bonds to them, there is nothing in the present Constitution which prohibits the State from becoming a stockholder, and thus making herself an owner to the extent of her interest. And this is the difference between the present Constitution and the Constitution of 1839. Under the latter, any aid to a corporation, having in charge such work, must have been a gratuity; under the former, the State may become a stockholder and owner to the extent of the aid extended; and should it happen that the Legislature should make it a gratuity now, that fact would not affect the constitutional power in the premises if it exists. That fact would go to determine whether the discretion exercised was sound, and in accordance with a proper legislative policy. It could go no further.

To return, however, to the general question. It seems to me that the comparisons of the Supreme Court of Michigan are not entirely opposite. There are essential differences between stage coaches and the other things mentioned, and railways. A railroad is a permanent thing connected with the soil, and under certain circumstances it has assigned to it by law a public character. We cannot say that it has not this character by the law because the law has failed to give the same character to something else different from it in some essential respects.

Mr. Chief Justice Redfield of the Supreme Court of Vermont, who has given great attention to that branch of the

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law which pertains to railways, says: "The decisions in the several States seem all to have been in favor of the power of the Legislature to build railways at the public expense, of which there is, perhaps, no great question, for it seems to be a species of internal improvement, which is in a measure indispensable to public interests and public functions in many ways."

I have thus given, I think, a fair and correct statement of the action of the courts in reference to this subject, and the cases quoted from are as strong representations of the respective sides of this question as can be found.

If we look to the history of the general government at the time when the subject of internal improvements by the general government was a matter of consideration and extended debate, we can find no sanction for view that a railroad which may be in part or in whole owned by individuals, is not a public work. In the early history of the republic, a difference in the views of the legislative and executive departments of the general government, in respect to its powers in the matter of internal improvements, is shown by Mr. Madison's veto of the act to set apart a fund for internal improvements, Mr. Monroe's veto of the act to repair the Cumberland road, and Gen. Jackson's veto of the act authorizing a subscription of stock in the Maysville Turnpike Company. These vetoes were based principally upon the ground that there was no such power granted to the general government as authorized these acts; there was no such power among the enumerated powers, nor was it a power incident to any specifically granted power. It was, however, conceded by many that an exercise of this power for purposes of general national, not local or State benefit, would be proper, and such measures as granted aid to railroads owned by individuals have repeatedly received the sanction of Congress. An examination of the debates in Congress during the year 1824, the period at which this question excited most interest and commentary, as well as the views expressed by

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the framers of the Federal Constitution, will show great difference in the views of eminent statesmen as to the constitutional power of Congress in this respect, but we can find no such general objection urged by individual members of Congress as that a railroad could not be a public work in contemplation of law because it was the property of an incorporated company. If Congress had been granted an express power to pledge the credit of the general government to construct "public works," I do not think any student of its history would long doubt that there would have been unanimity in the conclusion that some railroads, certainly those of a national character in point of locality, were public works.

On account of a difference claimed to exist between the powers of Congress and those of a State Legislature, it being said that one possessed only such powers as were specifically granted or were necessary for the exercise of those granted, and the other possessed all legislative power not prohibited or restrained by the constitution, these particular constitutional objections urged in Congress were not urged in the States where there were no restrictions in this respect upon legislative power; on the contrary, it was admitted generally that internal improvements within the States, such as railroads, canals, &c., were legitimate subjects for State aid when there was no constitutional inhibition. I do not think any one at all familiar with the public history of this country will be found to say that if we look to this history we must not conclude that a railroad may be a public work, although principally owned by individuals. Congress authorized subscriptions of stock to the Chesapeake and Ohio Canal company. Other like measures have received its sanction, and a railroad now stretches across the continent, the construction of which was greatly aided by its bounty. Every State in the Union has aided them in one way or another as public works. In the great commercial State of Pennsylvania there are over ninety laws enacted

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upon the basis that they were public works, and in the State of New York this practice of regarding them public works commenced with the origin of railroads and extends to the present time.

If we leave the United States and go to the history of Europe on this subject, we find that like works are regarded as public by all commercial nations. The history of France under the first Napoleon is amply suggestive of this. Indeed this was one solace of the Emperor when confined in St. Helena, for when speaking of his treatment by the allies, he says, "at least they cannot take from me hereafter the great public works which I have executed, the roads which I have made." I do not as a matter of course refer to this language as authority, but only as showing the accepted popular signification of the word public in this connection.

Accepted writers upon the laws of nations, in speaking of the duties of governments in this respect, use very expressive language. Vattel says, (Book I, chap. 9,) in speaking of the duty of governments in the matter of public ways of communication, that "one of the principal things that ought to employ the attention of the government with respect to the welfare for the public in general and trade in particular, must, then, relate to the highways, canals, &c. The whole nation ought to contribute to such useful undertakings." We find no sanction in these sources for the theory of the Michigan court, that, because a railway is in part owned by individuals, it is not a public work, and that taxation for that purpose was for a private purpose. This idea, when subjected to the test of close analysis, will not stand. That the instrument by which a thing is accomplished is to determine the character of the thing when accomplished, is not a truth either in philosophy or law. It is certainly a very narrow foundation for a judicial decision which pronounces unconstitutional an act of the Legislature upon the subject of taxation which is ordinarily a proper subject for legislative action, for it is neither an executive nor judicial discretion which

is exercised in determining either the subject of taxation or the ends and objects of the expenditure of public money.

With this statement of the conclusions of the courts of the several States of the Union in reference to this subject, as as well as the history and practice of the legislative departments of the government, State and Federal, and the standing given to roads by accepted writers upon international law, we can more intelligently define and construe our own constitutional provisions on the subject, and with this preface I now address myself to that question.

The clause is as follows: "The Legislature shall have power to provide for issuing State bonds, bearing interest, for securing the debt, and for the erection of State buildings, support of State institutions, and perfecting public works." Upon the face of this clause it is seen that the term "public works" is used in contra-distinction to State buildings and State institutions. If this is not so, and a "public work" within the meaning of this clause of the constitution is the same thing as a "State institution" or "building," then the term public works is surplusage, is unnecessary. This court held in (12 Fla., 205,) a former case involving the construction of a clause of the constitution, that such a construction of a clause in the constitution as made one portion of it surplusage, is not to be given if the clause in question is capable of receiving another intelligent and consistent construction. The term "State buildings" has a certain and fixed meaning. The term "State institutions" has a more enlarged signification, indicating in a limited and strict sense such institutions as the State establishes to discharge its duty in the matter of the administration of the criminal laws, such as State prisons, as well as such as it establishes to discharge its duty to the unfortunates of society, such as the indigent, insane, the deaf and dumb, the blind, and others in like condition. The terms "*perfecting public works*," in my opinion, clearly indicate and mean that works of a public character *already commenced* are to be perfected.

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They indicate something inchoate, something begun but not "perfected," and which should be "perfected" or finished. The inquiry at once presents itself, were there any such works of this character and in this condition when the present constitution was framed? It is unnecessary to cite authority to show that a clause of this character in a constitution, framed under the circumstances that our present constitution received its existence, must be interpreted in the light of the then present condition of things, as well as with reference to the past legislative and judicial history of the State in this respect. In the light of the past history of the State in these respects, and guided by the action of the legislative and judicial departments of the government, we inquire what unperfected public works are here referred to? At once we say that these words cannot and do not refer to any work owned exclusively by the State, for there were none such either commenced or perfected. There was no such thing as a State institution in its strict sense existing in the State to which these terms could be held to apply.

The first constitution of this State, the constitution of 1839, was framed by a body of men of distinguished ability; by men who knew what were the proper functions and the legitimate powers of a State in the complex system of government obtaining in this country; by men who understood as well the State's proper relations to the general government as they did its duties to its own citizens. Believing, as they no doubt did, that it was the peculiar if not the exclusive province of the State to aid in the construction of internal improvements, the benefits of which would be confined principally to State limits, and that it was proper to invest the legislative department of the government with the discretion of determining what were proper objects of State bounty, and believing that it was the true policy of the State to supply facilities to the traveling public, they adopted the following clause covering that subject: "A liberal system of internal improvements being essential to the

development of the resources of the country, shall be encouraged by the government of this State; and it shall be the duty of the General Assembly, as soon as practicable, to ascertain by law proper objects of improvement in relation to roads, canals, and navigable streams, and to provide for a suitable application of such funds as may be appropriated for such improvements." This body having the best reasons (derived from many sources, but particularly from the history of the territory of Florida,) for prohibiting the issue of State bonds, or pledging the faith of the State for any purpose of this kind, inserted another clause in that constitution which provided that "the General Assembly shall not pledge the faith and credit of the State to raise funds in aid of any corporation whatsoever." The effect of this constitution was therefore to acknowledge this duty, and while providing ample power for its discharge, it established such a check as would save the State credit and prevent that financial ruin which generally follows an unlimited power in the Legislature to pledge the credit of the State for such purposes. It could aid by an "application of funds appropriated," but it could not pledge the faith or credit of the State to raise such funds. In 1845, Congress appropriated for the purpose of internal improvements in this State five hundred thousand acres of land. Notwithstanding this mandate of the organic law, the language being "a liberal system of internal improvements *shall be encouraged*," and notwithstanding this bounty by Congress, and notwithstanding the fact that Florida nearly equaled in square miles of territory the States of New York, New Jersey and Connecticut, making such improvements a great necessity, no established line of railway affording any considerable facilities to the people of the State was constructed for years. A system of improvements of this character, after being for years the subject of consideration upon the part of those whose duty it was to devise a system, was provided for by an act of the

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Legislature of this State approved January 6, 1855, entitled "An act to provide for and encourage a liberal system of Internal Improvements in this State." The five hundred thousand acres of land granted, for that purpose by Congress, as well as millions of acres of what is known as swamp lands, were constituted a fund for the purpose of internal improvements, and the Legislature designated certain lines of railway and canal as proper improvements to be aided from this fund. Quite a number of cases have been adjudicated in this Court, in which the companies entrusted by the State to construct the lines of railway indicated have been parties, and the courts in speaking of these contemplated improvements have styled them "*great public enterprises*," as "enterprises in which the public have interests." This Court in 1862 said that "it could not forget that the community have rights in reference to these improvements, and that the happiness and well-being of every citizen depends on their preservation." Mr. Justice Walker of this Court, in 1862, speaks of this act as one "inaugurating a great constitutional system, a system which has enabled the State of Florida, the weakest in population among her sisters, to build more railroad in the same length of time than any other State in the world."

At the time of the adoption of the present constitution this system of public improvements had advanced greatly. There were a number of lines of road in operation, but there was a considerable and very important portion unfinished. The highest interest of the State required its completion. With this system incomplete, the capital of the State was reached with difficulty by citizens residing south and west, and many of the people in the western portion of the State were anxious for the want of these facilities, combined with other reasons, to become a portion of the State of Alabama.

In my opinion, these incompleated lines of railway and the internal improvements contemplated in the system created by the act referred to, were the unperfected "public works"

which the Constitution of 1868 contemplated should be perfected:

It may be said that the power to pledge the credit of the State is a very dangerous power to be vested in the Legislature, and that it should never be exercised unless the State has the most adequate security for the construction of the works. This is true, but there is no more power in the judicial department of the government to control a legislative discretion than there is in the legislative department to direct and control a judicial tribunal in pronouncing judgment in any action pending before it. If this dangerous power has been conferred, or it is being used and exercised without adequate security, we cannot for that reason say it has not been conferred, but the law must receive the same construction it would when the power is exercised in the most careful and judicial manner. For us to deny the power would be to assume that we were superior to the Constitution. If we can do this in one particular, we can do it in all respects, and that would make the very existence of the government a subject of judicial discretion.

I cannot close this communication better than by quoting the language of Chief Justice Black, of the Supreme Court of Pennsylvania, who felt constrained to sustain an act of the Legislature authorizing a resort to taxation for the purpose of constructing a railway. "If the power exists, it will continue to be exerted, and generally it will be used under the influence of those who are personally interested and who do not see or care for the ultimate injury it may bring upon the people at large. The selfish passion is intensified by the prospect of immediate gain; private speculation becomes ardent, energetic and daring, while public spirit, cold and timid at the best, grows feebler still when the danger is remote. Under these circumstances it is easy to see where this ultra enterprising spirit will end. But all these considerations are entitled to no influence here. We are to deal with it strictly as a judicial question." The conclusion I have

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reached in this matter I regret. I believe the power to pledge the faith and credit of a State or Nation should not exist except for purposes of national defence in time of war. It is a poor government that cannot sustain itself by legitimate taxation, and in the light of past history we can truly say that it is best that the powers of the government should be thus limited, or if public enterprises are to be aided, that such aid should be in the form of a cash appropriation, thus preventing burdensome and oftentimes repudiated indebtedness. All of these things, however, would not justify me in stating a conclusion as to a matter of law which my conscience did not approve.

Very respectfully,

JAS. D. WESTCOTT, Jr.,
Associate Justice Supreme Court.

Opinion of Justice HART in reply to the letter of the Governor, dated February 6, 1871.

SUPREME COURT, STATE OF FLORIDA, }
Tallahassee, Feb. 15, 1871. }

In response to the inquiries of his Excellency Harrison Reed, Governor of the State of Florida, in a communication to the Honorable E. M. Randall, Chief Justice of the Supreme Court dated the 6th inst., referring to Section 16 of Article V, and section 7 of Article XII, of the State Constitution, and to the statute of 1870, providing for State aid to certain railroad corporations, and asking the opinion of the Supreme Court as to whether the Legislature has power to declare what are public works, whether railroads are public works referred to by the Constitution, and whether the Legislature has power under our Constitution to aid in the construction and completion of them, I have the honor to present the following opinion:

When it is remembered that the Constitution of the State

specifically provides for the building of court-houses and jails; the establishment, support, and maintenance of educational institutions; institutions for the benefit of the insane, blind, deaf, and such other benevolent institutions as the public good may require; a State prison; house of refuge for juvenile offenders; a home and work house for common vagrants; and provides for those of the inhabitants who, by reason of age, infirmity, or misfortune, may have claims upon the aid and humanity of society; and for State buildings; almost every kind of institution and ordinary structure that State Constitutions generally provide for, no person acquainted with the legislation of this State in 1854-'55-'56, in regard to railroads, with the decisions of its Supreme Court upon that legislation, with the condition of Florida in regard to its great need of them, with the fact that they are still unfinished, and also with the fact that the land grants by Congress in aid of them, as to the unfinished parts, had lapsed, and, from the events of the rebellion and civil war, were not likely, for at least some years, to be renewed, can for a moment fail to recognize the object of the use of the words, "*and for perfecting public works*" in Section 7 of Article XII of the Constitution. As one who was a member of the Convention that framed the Constitution, and as one of the people who voted for its ratification, I cannot unlearn or ignore the certainty that those words had special reference to our great unfinished railroad system, so necessary to the settlement, development, and prosperity of Florida, and so convenient, useful, and beneficial to the whole public.

Viewed in the light of the legislative and judicial history of this State upon this subject and of the public facts above mentioned, the aforesaid words, "*and perfecting public works*," are as potent to authorize legislative enactments declaring railroads public works, and providing for raising means to aid in having them perfected, and especially such as the system inaugurated by the statute, approved January 6, 1855, commonly known as "*the internal improvement*

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law," as if those works were more definitely and particularly mentioned.

Constitutional provisions and grants of authority are not expected to be as explicit as statutory enactments. From their very nature something must be left to the intelligence, sound judgment, patriotism, discretion, and progressive enterprise of the legislators. Many of the men who were members of the aforesaid Constitutional Convention were afterwards members of the Legislature that enacted the said statute of 1870. Men of integrity and ability, and sworn to support the Constitution, they certainly knew what the aforesaid words meant, and what the powers of the Legislature were under them.

Every presumption is in favor of the constitutionality of an act of the Legislature, and it should not be pronounced unconstitutional unless it is so plainly so as that such a conclusion cannot be reasonably avoided.

The wisdom and policy of the statute is not the question for the court. With that matter the justices have nothing whatever to do. The legislators are responsible to their constituents, and the judges to conscience and the law.

The people of the State have, in the Constitution, vested the legislative power of the State in the Legislature. That comprehensive grant of power is, in my opinion, itself amply sufficient to cover all the ground, and to authorize the Legislature to do any legislative act not prohibited by the same Constitution, nor by the Constitution of the United States; to enact any statute which in its judgment the public weal requires; to do what ever the State can do in the way of legislation. I presume it will not be doubted that statutes declaring what are public works, and providing for the completion of them, are acts of legislation, and form a part of the legislative power of the State.

The statute of 1870 referred to, treats of the same subject-matter with the aforesaid internal improvement law, and provides for aid to perfect most of the same lines of railroad

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and others of the same and other public works. Both provide for State aid; one indirect, the other direct. One setting aside State property and authorizing it to be pledged; the other providing for pledging the credit of the State upon mortgage liens in lieu of the said credit.

Upon a careful consideration of the subject, I am of the opinion that the said act of 1870 is constitutional, and that the inquiries of his Excellency the Governor should be answered in the affirmative.

Very respectfully,

O. B. HART,

Associate Justice Supreme Court.

Opinion of E. M. RANDALL, C. J., in reply to the letter of the Governor, dated February 6, 1871.

TALLAHASSEE, FLA., *Feb. 25, 1871.*

To his Excellency HARRISON REED, *Governor*:

SIR:—Your official communication of the 6th instant would have received an earlier reply but for the fact that at the time it was received I was much engaged in other official duties which required early attention.

Your questions, suggested by recent legislation under the 7th Section of Article XII of the Constitution, which provides that the Legislature may "provide for issuing State bonds bearing interest for securing the debt of the State, and for the erection of State buildings, support of State institutions and perfecting public works," are as follows:

1. Has the Legislature power to declare what are "public works?"
2. Are Railroads public works referred to by the Constitution? and
3. Has the Legislature power under our Constitution to aid in the construction and completion of these public works?

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As to the first question. Has the Legislature power to declare what are public works? If by this inquiry it is intended to ascertain whether in my opinion everything which the Legislature might declare to be a public work is such, or would become such within the meaning of the Constitution by the legislative declaration, I must answer it in the negative. Railroads or canals, or other works of internal improvement and general utility, whether operated and owned by the State or by a county, or an individual, are not public works by reason of the christening received by means of a legislative enactment, but because of their peculiar character, their uses and purposes and their general effect, all combined.

To illustrate briefly: if the Legislature should declare my house to be a "public work," the simple declaration would not make it such in law or in fact. It would yet be my private property, and the general public would have no greater right to use or enjoy it without my consent than they had before the enactment. The issue of bonds by the State to aid in building or perfecting my house, because of such legislative declaration, would not be warranted by the provision of the Constitution referred to.

To the second question: Are Railroads "public works" referred to by the Constitution? I answer, that according to the common idea as to what a railroad is, they are public works. They are constructed, whether by the State or the citizen, for the use and convenience of the public for purposes of travel, of facilitating commerce, and commercial and social intercourse, of affording markets for all the productions of the country. They enhance values, encourage and promote immigration, increase the extent of productive agriculture, and are, like natural streams, public necessities; the highways upon which all may travel and transact business, access to them being open to all the people on equal terms, and can be denied to none. But argument and illustration are superfluous. The legislative and judicial branches of

nearly all the States of the Union, as well as of the United States government, have so thoroughly settled the question upon principle, as well as upon public necessity, that it would be as idle and futile to attempt to reverse the current in that direction, as to stay the tides of the sea with a broom.

But the action of the several branches of the government of this State in reference to railroads and like enterprises, and in view of which action the terms of the Constitution were doubtless used, have given us an unmistakable guide in determining the meaning of such terms employed in it on this subject as seem to require interpretation.

To admit that railroads are public for one purpose and private for another purpose, solves the whole question involved. If they are public works in any sense, they are so within the terms of the Constitution.

In the exercise of the right of eminent domain, not only this State, but practically, all the States have used the power of subjecting private property to the public use and necessities, in obtaining the right of way for railroads in the process of construction, as for other roads created for the public use and convenience, upon the acknowledged principle that the rights of the individual must be in subordination to the interests of the whole community, saving only to the individual a compensation for the sacrifice involved.

I will not elaborate the proposition; that has been amply done by Mr. Justice Westcott in his reply already forwarded.

Third. Has the Legislature power, under our Constitution, to aid in the construction and completion of these public works? This, in the form presented, admits in my judgment neither an affirmative nor a negative answer. The language of the Constitution is special; the term "perfecting" does not mean in its broad sense "constructing" public works. If the framers of that instrument had intended that the Legislature might have power to authorize an unlimited

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bonded indebtedness for the general inauguration and construction of public works, they would not have used a term which merely includes the completing or finishing of works of public utility already authorized and incomplete. As is suggested by my brother Westcott, and as everybody knows who has examined the legislation of this State, and recognizes the existence of a system of internal improvements long since inaugurated by the people through the legislative branch of the State government, this system was in progress of development and completion at the time of the adoption of the Constitution. There was but one system or series of such public measures in progress, and none, I believe, under the exclusive control of the State.

My opinion is that the term "perfecting public works" refers strictly to the completion of such public works, including railroads, as were projected and in progress, or partially constructed at the time of the adoption of that phrase in the fundamental law of the State.

I have thus given, as briefly as possible, my opinion in reply to the questions propounded. Whether or not the recent legislation under this constitutional provision was wise, cannot affect the action of the courts. We have from these seats no right to question the wisdom of the Legislature as to the manner in which they have exercised or may exercise their discretion.

I have the honor to be,

Very respectfully,

E. M. RANDALL, C. J.

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2. That defendant "has interfered and intermeddled with the property, and still continues to do so, and has and still continues to forbid the tenants and lessees to pay the rents to the plaintiff, and has forcibly entered one of the buildings on the premises," does not lay a foundation for an injunction. There are clear remedies at law for a failure of a lessee to pay rent. The forcible entry is remediable at law also, and the terms "interfering and intermeddling" do not disclose a case of threatened trespass, accompanied with irreparable injury or other circumstances calling for the aid of a court of equity. *Ibid* 381

3. The statute of December 13th, 1861, suspended the statute of limitations then in force "in relation to civil actions:" *Held*, that this suspension applied only to *civil actions*, according to the ordinary legal and popular signification and understanding of the terms, and did not apply to the presentation of claims against the estates of deceased persons. *Bradford vs. Shine*. 393

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6. Nor does a provision in the act of incorporation that the council must "make to the party injured by an improvement a just compensation," to be ascertained in such manner as is provided in the act, make the corporation liable to an action for such injury. There being no right of action at common law, the remedy created by the Legislature must be pursued.—*Ibid*. 538

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2. The act of Dec. 20, 1869, amending the attachment laws, provides that the applicant shall make oath that the amount of the debt

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or sum demanded is actually due, and that he has reason to believe that the defendant will fraudulently part with his property before judgment can be recovered against him. Upon a motion to dissolve an attachment issued under this provision, the issue to be tried is not confined within the spirit of the law to facts which had come to the knowledge of the affiant. The object of the law was to give a remedy when there was in fact reason to believe that the defendant would fraudulently part with his property within the time specified.—*Ibid* 597

AGENT—

1. When an agent of the plaintiffs made an affidavit for the purpose of procuring a writ of attachment and upon a traverse of the affidavit it was shown, and not denied, that the statement of the amount due was based upon the admission of the defendant to the agent, the defendant is estopped from insisting upon a motion to dissolve the writ of attachment, that a sum less than that so admitted and stated in the affidavit was actually due. *Zim et. al. vs. Dzialynski*..... 597

AMERICAN STATE PAPERS—

1. The volumes of "American State Papers," published under the authority of Congress, containing copies and translations of the original grants or concessions of lands by the Spanish government, are as valid evidence in the investigation of claims to lands in courts of justice as though they were authenticated in any other mode recognized by law. *Doe ex dem Magruder et. al. vs. Roe*..... 602

APPEAL—

1. A supersedeas granted upon an appeal from an order allowing a preliminary injunction and appointing a receiver *pendente lite*, suspends the operation of the order and prohibits the further action of the receiver in carrying out the mandate of the order from which the appeal is taken. *State vs. Johnson*..... 33

2. When an appeal is prosecuted by the "defendants now living," omitting individual names, and by a person who purports to be the legal representative of one who was a party to the decree, and such legal representative was never made a party to the proceedings either in the court below or in this court, it must be dismissed. The legal representative in such case is in no condition to prosecute the appeal, and the terms "defendants now living" fail to identify with requisite certainty the individuals whose interests are to be affected, should the court act. *Alston et. al. vs. Rowls*..... 110

3. Where the paper filed in this court upon which an appeal is to be heard, is certified by the Clerk of the Circuit Court to contain "copies of original on file in the cause" in the Circuit Court, and it is apparent that only a portion of the proceedings is embraced in what

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- is thus certified, a *certiorari* cannot be granted to supply the deficiency, and the case will be stricken from the docket. *Caulk vs. Fox and wife* 147
4. A writ of error is not the proper process to bring up for review an order or decree in a suit in equity; the only method known to our statutes is an appeal. *County Commissioners Columbia County vs. Bryson et al.* 281
5. When a demurrer to a bill is filed without being accompanied by certificate of counsel as required by the 31st Chancery Rule, advantage of the omission should be taken by motion to strike off the demurrer; but if the parties proceed to a hearing without regarding the omission, and the questions raised by demurrer are passed upon by the court, it is too late, upon appeal, to raise the objection. *Keen et al. vs. Jordan* 327
6. An appeal by a defendant may be considered such an appearance in the cause that the Circuit Court, on the return of the cause, may proceed thereafter as though the appellant had been served with process. *Standley vs. Arnow* 361
7. Where a decree of divorce has been passed, an appeal taken, and *supersedeas* awarded, a court of equity should not award an injunction to control the operation of the *supersedeas*. *Burns vs. Sanderson and Burns* 381
8. A decision of the Circuit Court overruling a demurrer in "action for the recovery of money only," is not such an "order, decision, or judgment," as authorizes an appeal before final judgment under section 10 of the Code of Procedure. *Barkley vs. Russ* 589
9. An appeal in a common law case lies only after a final judgment, and that final judgment must appear in the record otherwise than by a mere recitation of the fact in the bill of exceptions. *Anderson vs. Presbyterian Church* 592
10. Where the plaintiff asks and voluntarily submits to a non-suit, no appeal lies at his instance to this Court. A court of review will not in such case on appeal reverse the judgment of non-suit, nor will it look into other questions presented by the bill of exceptions.—*Ibid* 592
11. An appeal is not "obtained" until all the requirements of the statute necessary to make it effectual are complied with; and in cases at law, the giving and approving of a bond is one of the prerequisites. *Thomp. Dig.*, 446. *Hall vs. Penney* 593
12. All the steps necessary to perfect an appeal, if the appeal be applied for during a term of the Circuit Court, must be taken during the term; and if the appeal be applied for in vacation, all the requirements of law must be complied with within ten days after the close of the term, otherwise an appeal is not "obtained" within the meaning of the statute.—*Ibid* 593

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APPEAL—(Continued.)

13. The Supreme Court has no appellate jurisdiction in cases of misdemeanor, and an appeal from a judgment of conviction had in the Circuit Court must be dismissed: *Held*, That the jurisdiction of the Circuit Court, in cases of misdemeanor, is appellate only. *Burton vs. State*..... 670
 (See Practice.)

APPEARANCE—

1. That a party procures the entry of his appearance with the statement that his appearance is special, does not alter the effect of the appearance if he contests the suit upon its merits. If, notwithstanding this entry, he contests the suit upon its merits in the court below, obtaining a judgment in his favor, and upon an appeal to this court contests the appeal upon its merits, he is in court for all purposes, and upon remanding the case will be held to file his defences in the regular order of pleading. *Scarlett vs. Hicks et al.*..... 314
2. An appearance for the purpose of objecting to proceedings does not necessarily waive irregularities in the service of process. *Standley vs. Arnow*..... 361
3. An appeal by a defendant may be considered such an appearance in the cause that the Circuit Court, on the return of the cause, may proceed thereafter as though the appellant had been served with process.—*Ibid*..... 361
4. After an appearance and argument of the motion upon the merits, any irregularity in the service of the notice is cured. *Pearce vs. Thackeray* 574
 (See Attorney.)

APPEAL BOND—

1. An appeal is not "obtained" until all the requirements of the statute necessary to make it effectual are complied with; and in cases at law, the giving and approving of a bond is one of the prerequisites. *Thomp. Dig.*, 446. *Hall et al. vs. Penney*..... 593

ARRANGEMENT AND PLEAS—

1. The plea of the prisoner in a capital case must precede the swearing of the jury. *Dixon vs. State*..... 631
2. When there is sufficient in the record to show the presence of the prisoner in Court during the proceedings, the omission to read the indictment to the prisoner, and to demand of the prisoner whether he is guilty or not guilty of the charge, is waived by his pleading to the indictment.—*Ibid*..... 631
3. The prisoner having entered the plea of not guilty, concluding to the country, the addition of the similiter by the State is not essential to the regularity of the conviction, and its omission does not authorize an arrest of the judgment.—*Ibid*..... 631

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ARREST OF JUDGMENT—

1. Under the statutes of this State, a total variance between the writ and declaration is no ground after verdict for an arrest of judgment in the court below, nor for a reversal of the judgment in this court. *Robinson vs. Hartridge*..... 501

ATTACHMENT—

1. A levy by virtue of an ancillary attachment upon lands, creates a lien upon the land, of which subsequent purchasers are bound to take notice, and an irregularity anterior to the issuing of the attachment does not affect the lien. *Budd vs. Long*..... 268

2. An affidavit made for the purpose of procuring an attachment against the property of a debtor, stated that "the defendant is justly indebted to the plaintiffs in the sum of \$1,829.95, which amount is now actually due; and that the affiant has reason to believe that the defendant will fraudulently part with his property before judgment can be recovered against him." The defendant, traversing this affidavit for the purpose of moving to dissolve the attachment, says that the affidavit made in behalf of the plaintiffs "is untrue, wherein it alleges that the defendant is indebted to the plaintiffs in the sum of \$1,829.95, and that the same is actually due; and that said affidavit is untrue wherein it alleges that the affiant has reason to believe that the defendant will fraudulently part with his property before judgment can be recovered against him." On trial of this issue before a jury, the Court charged that "the plaintiff must prove the amount named in the affidavit, \$1,829.95, is actually due, and that he has reason to believe the defendant would fraudulently part with his property before judgment can be recovered against him." *Held*: That the words "actually due" referred to the question whether the amount of indebtedness had actually become due and payable at the time, and not to the precise amount of the indebtedness; and if it was proved that the amount actually due was less than the amount stated, but sufficient to give the Court jurisdiction, this is substantial affirmative proof of that branch of the issue, and the charge was too strict. *Zynn et al. vs Dzialynski*..... 597

3. When an agent of the plaintiffs made an affidavit for the purpose of procuring a writ of attachment, and upon a traverse of the affidavit it was shown, and not denied, that the statement of the amount due was based upon the admission of the defendant to the agent, the defendant is estopped from insisting upon a motion to dissolve the writ of attachment, that a sum less than that so admitted and stated in the affidavit was actually due.—*Ibid*..... 597

4. The act of December 20, 1859, amending the attachment laws, provides that the applicant shall make oath that the amount of the debt or sum demanded is actually due, and that he has reason to believe that the defendant will fraudulently part with his property

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before judgment can be recovered against him. Upon a motion to dissolve an attachment issued under this provision, the issue to be tried is not confined within the spirit of the law to facts which had come to the knowledge of the affiant. The object of the law was to give a remedy when there was in fact reason to believe that the defendant would fraudulently part with his property within the time specified.—*Ibid*..... 597

ATTORNEYS—

1. When the defendant answers a bill in equity, reserving the questions of law, and at the final hearing the court is of opinion that there is not such a case made by the bill as will warrant relief, the bill should be dismissed. Judgment was entered in the county court in 1842, upon a promissory note made by defendant. No legal service of the summons was made upon defendant; but an unauthorized attorney entered an appearance for defendant at the return of the summons, and defendant alleges that he had no knowledge of the existence of the judgment until twenty years after it was entered; after which the judgment was revived by *scire facias*, and execution issued and levied upon defendant's property. Upon bill filed by defendant in 1868, alleging these facts, and seeking to enjoin the enforcement of the judgment, but failing to show that the defendant had a legal or equitable defence against the note sued on: *Held*,

2. A plaintiff cannot be held to inquire into and ascertain whether an attorney, who, in open court, upon the calling of the docket, enters an appearance for a defendant, is duly authorized to appear. *Budd vs. Gamble*..... 265

3. To dissolve an injunction where the only relief to be obtained is a perpetual injunction staying proceedings at law, is equivalent to dismissing the bill. In such a case as this, where there is abundant equity in the bill, where some of the defendants are non-residents, and where a subpoena has been issued and served upon one of the defendants in person, and upon the attorney of the non-resident defendants, the injunction should not be dissolved upon the ground of delay in prosecuting the suit. *Scarlett vs. Hicks*..... 314
(See Sheriff.)

BILL OF EXCEPTIONS—

1. It is not necessary under the laws of this State, that a bill of exception in civil causes should be sealed by the Judge, the signing by him is sufficient. *Robinson vs. L'Engle*..... 482

2. A memorandum made by the Clerk of the Court, in taking down the testimony of witnesses, as that certain questions were asked and not allowed by the court, and exceptions taken, is not a part of the record and does not dispense with the preparation and signing of a

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bill of exceptions, in order to bring the matter before the appellate court.—*Ibid* 482

3. Bill of exceptions must be made up and signed during the term, under the rules of practice in the Circuit Courts, in all cases except where, by special order, further time is allowed. Where the Judge, in signing the bill of exceptions, certifies that the bill is made up and tendered for signature after the term, by his special leave and authority, it is presumed that special leave was granted during the term by an order of the court. *Robinson vs. Hartridge*..... 501

4. An appellate court will not review any action of the inferior court, involving a consideration of the whole testimony, unless the whole of the evidence is before the reviewing court; but it is not necessary that a bill of exceptions should, in precise words, state that all of the testimony introduced is embodied in it. Where the bill purports to contain the evidence which "the plaintiff gave in his behalf," and the evidence "given in behalf of the defendant," reciting after this statement the evidence offered, it is sufficient.—*Ibid*..... 501

5. Where it appears from the record that an objection was noted to interrogatories, to be propounded to a witness to be examined upon commission, and the record is entirely silent as to any disposition made of these objections by the court, and the bill contains the answers of the witness, the presumption is that the party making the objection abandoned it, and that the deposition was read.—*Ibid*..... 501

6. A bill of exceptions should be made up and signed during the term of the court at which the trial is had, unless by special order further time is allowed. *Barden vs. L'Engle*..... 571

7. An appeal in common law cases lies only after final judgment, and that final judgment must appear in the record otherwise than by a mere recitation of the fact in the bill of exceptions. *Anderson vs. Presbyterian Church*..... 592

8. Where the plaintiff asks and voluntarily submits to a non-suit, no appeal lies at his instance to this Court. A court of review will not in such case on appeal reverse the judgment of non-suit, nor will it look into other questions presented by the bill of exceptions.—*Ibid*.... 592

9. When a bill of exceptions is signed by the Judge, it will be presumed that it was signed within the time prescribed by law, unless there is in the record some evidence to the contrary. *Doe ex dem. Magruder et al. vs. Roe*..... 602
(See Practice.)

CANVASS—

1. This Court has the power to grant a writ of mandamus directing the Board of State Canvassers to re-assemble and complete a canvass of the returns of votes cast at a State election where they have neglected to make a complete canvass of the returns in their possession. *State ex. rel. Bloxham vs. Board of State Canvassers*..... 55

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CANVASS—(Continued.)

2. The object of the law creating a Board of Canvassers of election returns is to ascertain from the returns the whole number of votes cast, and to determine therefrom and certify the result of the election. They are required by law to meet at a given day for this purpose, and may adjourn from day to day until their duties are completed; and in case legal returns are received by them at any time before they complete the canvass, which would have been counted if received by the day appointed by law, it is their duty to include them in the canvass and certificate, and if they refuse, they may be required by a writ of mandamus to complete the canvass of all the returns received, and to certify the result according to law.—*Ibid*.....

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3. A peremptory mandamus will not be granted upon the return of an alternative writ, unless the respondents may be required to do all that is required by the alternative writ, and therefore where the alternative writ required all the members of a Board of Canvassers to canvass the returns and declare the result of an election, and after that, that one of them in another official capacity should record the proceedings of the Board, and issue a certificate thereon, the peremptory writ was refused; for, until an officer shall have neglected or refused to perform a duty, he cannot be proceeded against by this writ, and the officer who may be required to give a certificate of the proceedings of a Board cannot be so required until the Board shall have acted.—*Ibid*.....

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4. An injunction, restraining a Board of Canvassers from proceeding to canvass and certify the result of an election until further order of the Judge granting the same, where the statute requires the Board to proceed by a certain day, is unauthorized.—*Ibid*.....

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5. Pending the proceedings by mandamus against a Board of Canvassers, the Legislature repealed the law creating such Board, without saving proceedings or duties required by law to be performed by them and uncompleted: *Held*, That the power of the Board to proceed was gone, and therefore the proceedings against them were dismissed.—*Ibid*

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CERTIORARI—

1. Where the paper filed in this court upon which an appeal is to be heard, is certified by the Clerk of the Circuit Court to contain "copies of originals on file in the cause" in the Circuit Court, and it is apparent that only a portion of the proceedings is embraced in what is thus certified, a *certiorari* cannot be granted to supply the deficiency, and the case will be stricken from the docket. *Caulk vs. Fox and Wife*.....

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CHANGE OF VENUE—

1. In applying for a change of venue in criminal cases upon the ground that a fair trial cannot be had in the county, the statute contemplates that facts shall be stated which satisfy the court that the motion is well founded. But whether this court can review the action of the Circuit Court in the exercise of its discretion in this matter, *quere?* *Barber vs. State*..... 675

CIRCUIT COURT—

1. The County Court, not having the power to enjoin execution of a judgment at law rendered by the Circuit Court, a Court of Chancery may grant relief by injunction without removing the administration of the assets of an estate to its own jurisdiction. *Scarlett vs. Hicks et al.*..... 314
2. An injunction continues, under the practice in this State, for the time fixed by the order granting it, and if no time is limited, until the hearing, unless it is sooner dissolved. There are no terms of the court for chancery proceedings. The court, under the statute, is always open for such proceedings, whether interlocutory or final.—*Ibid.*..... 314
3. The Circuit Court, independent of express legislation, has the power to re-establish a judgment roll or entry when the original record is lost or destroyed. *Pearce vs. Thackeray*..... 574

CODE OF PROCEDURE—

1. When, before the adoption of the Code of Procedure, a cause was referred by the Circuit Court to a practising attorney as referee, in pursuance of the 17th section of Art. VI of the Constitution, to be tried and determined by him; and upon a hearing of the cause upon the law and facts he made his decision and filed the same, with a record of his proceedings, in the office of the clerk of the Circuit Court in vacation, such decision does not become a final judgment of the Court without further action of the Court thereon, and an appeal cannot be taken from the decision of the referee to the Supreme Court as from a final judgment. *Chambers vs. Savage et al.*.... 585

(See Practice under the Code.)

COMPTROLLER—

1. Where provision is made by law for the salary of an officer, the drawing of a warrant by the Comptroller is a ministerial act, which may be enforced by mandamus, and the Court may, in such proceeding, determine whether the appointment of the officer is void, where there is no other incumbent of the office exercising its functions by color of right. *State ex rel. Weeks vs. Gamble*..... 9

CONFLICT OF LAWS—

1. The laws of another State upon a subject matter in litigation is considered to be the same as the law of this State, until shown by due allegation and proof to be otherwise. *Bemis vs. McKenzie*..... 553

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CONSTITUTIONAL CONVENTION—

1. The courts of this State derive their jurisdiction from the State Constitution. They cannot assume jurisdiction not granted, or which is denied, although the effect may be that the obligation of a contract cannot be enforced. The jurisdiction of the courts is no part of the obligation of a contract. The last clause of section 26, article xvi of the Constitution, provides that "all judgments and decrees rendered in any of the courts of this State since the 10th day of January, A. D. 1861, upon all deeds or bills of sale, or upon any bond, bill, note, or other evidence of debt, based upon the sale or purchase of slaves, are hereby declared set aside, and the plea of failure of consideration shall be held a good defence in all actions to said suit." *Held,*

That this action is legislative, not judicial; that it prescribes a rule for the action of the courts in reference to a particular class of judgments upon their records; that it is a law operating retrospectively upon the contract; that its effect is to make that which was a good consideration for a contract, at the time and place it was entered into, not a good consideration; that this is to destroy the obligation of the contract, and it is therefore void. The abolition of slavery or the emancipation of the slave does not destroy the right of action which a vendor of the slave so emancipated has against the vendee, who owned the slave at the time of his emancipation, and any action of a convention of this character, which directs the courts to hold otherwise, is void, as it impairs the obligation on the contract. *McNealy vs. Gregory*..... 417

2. If the purpose of the convention in this clause was to destroy all the right of the plaintiff in execution in this judgment, as a punishment for making this species of property the subject of sale, or for any other act, then, viewed in the aspect, it becomes a bill of pains and penalties, and is void.—*Ibid*..... 417

3. If it is regarded as the exercise of judicial power by the convention, the result of which is to set aside the judgment, then it is the exercise of a power by the delegate which had not been conferred, and the delegate possessed no inherent power of the character here exercised; nor could such an act become valid by receiving the sanction of a majority vote of the people. A citizen of the United States, in time of peace, has a right, under the Constitution of the United States, to have his rights to property made the subject of adjudication and investigation by no other tribunal than one which is a part of a government republican in form, such as a court of the United States, or of a State, where the judicial powers of government are confided to a recognized judicial department, controlled in their judgments by the law of the land; nor can the people, by a simple majority vote, give validity to the void act of a body of dele-

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gates which deprive the citizen of his property without due process of law.—*Ibid*..... 417

CONSTITUTIONAL LAW—

1. Section 7, and Article V, of the Constitution of this State, provides that "when any office, from any cause, shall become vacant and no mode is provided by this Constitution, or by the laws of the State, for filling such vacancy, the Governor shall have power to fill such vacancy by granting a commission, which shall expire at the next election." *Held*,

That the power vested in the Governor by this section is not a power to fill any office for the *unexpired term*; that this power remains with the people, and that the power here conferred is to provide an incumbent for the office between the date of the removal or death of the regular incumbent, and the filling of the office by an election by the people. State *ex. rel.* Weeks vs. Gamble, Comptroller..... 9

2. That while the Constitution does not fix the precise time for the "next election," yet it is the duty of the authorities to see that the time of this election is not indefinitely postponed at the expense of the rights of the people.—*Ibid*..... 9

3. The Constitution of this State, (1868,) Article VI, Section 5, provides that "The Court shall have power to issue writs of mandamus, certiorari, prohibition, quo warranto, habeas corpus, and also all writs necessary or proper to the complete exercise of the appellate jurisdiction. Each of the Justices shall have power to issue writs of habeas corpus to any part of the State," &c.: *Held*, That this is a general grant of power to use certain writs in the exercise of its jurisdiction, and that it is competent for the Legislature to prescribe the manner of obtaining and issuing process, and to provide that such process may be issued out of the Supreme Court in vacation as well as in term time; and the provisions of the Constitution do not repeal or invalidate acts of preceding Legislatures, authorizing Justices and Judges to allow supersedeas, writs of errors, and other process, and prescribing the effect of such process.—State vs. Johnson..... 33

4. The fourth section of the act approved January 24, 1851, authorizing a judge of one circuit to make orders in suits pending in another circuit in vacation, when the judge of the latter circuit is under the disabilities mentioned in the act, is not in conflict with the constitution of 1868. The order made by the judge of another circuit is *pro hac vice*, the order of the court in which the cause is pending, and such order must be filed therein. Swenson *et. al.* vs. Call & Baker..... 337

5. The Constitutional Convention of 1865 ordained, and the ordinance was incorporated in the constitution, "that no law of this State providing that claims or demands against the estates of dece-

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dents shall be barred if not presented within two years, shall be considered as in force within this State between the 10th of January, 1861, and the 25th October, 1865:" *Held*, that the convention of 1865 was called for the purpose of amending the constitution of the State to conform to the then existing political condition of the country, and not for the purposes of general or special legislation, and that the provisions of such an ordinance could have no legal force. *Bradford vs. Shine*..... 393

6. The Legislature may repeal a statute limiting the time for commencing civil actions, and thus deprive a party of the right to plead the statute as a defence.—*Ibid*..... 393

7. The law provides that all debts and demands against the estate of any testator or intestate, which shall not be exhibited within two years after notice given to that effect by the executor or administrator, shall forever afterward be debarred: *Held*, that the repeal of this statute, after the expiration of the time so limited, does not revive the right to prosecute the claim, nor deprive the representative of a deceased person of his right to plead the bar, the right of action being extinguished in such case.—*Ibid*..... 393

8. The courts of this State derive their jurisdiction from the State constitution. They cannot assume jurisdiction not granted, or which is denied, although the effect may be that the obligation of a contract cannot be enforced. The jurisdiction of the courts is no part of the obligation of a contract. The last clause of section 26, article xvi, of the constitution, provides that "all judgments and decrees rendered in any of the courts of this State since the 10th day of January, A. D. 1861, upon all deeds or bills of sale, or upon any bond, bill, note, or other evidence of debt, based upon the sale or purchase of slaves, are hereby declared set aside, and the plea of failure of consideration shall be held a good defence in all actions in said suit:" *Held*,

That this action is legislative, not judicial; that it prescribes a rule for the action of the courts in reference to a particular class of judgments upon their records; that it is a law operating retrospectively upon the contract; that its effect is to make that which was a good consideration for a contract, at the time and place it was entered into, not a good consideration; that this is to destroy the obligation of the contract, and it is therefore void. The abolition of slavery or the emancipation of the slave does not destroy the right of action which a vendor of the slave so emancipated has against the vendee, who owned the slave at the time of his emancipation, and any action of a convention of this character which directs the courts to hold otherwise, is void as it impairs the obligation of the contract—*McNealy vs. Gregory*..... 417

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CONSTITUTIONAL LAW—(Continued.)

9. If the purpose of the convention in this clause was to destroy all the right of the plaintiff in execution in this judgment, as a punishment for making this species of property the subject of sale, or for any other act, then, viewed in this aspect, it becomes a bill of pains and penalties, and is void.—*Ibid*..... 417

10. If it is regarded as the exercise of judicial power by the convention, the result of which is to set aside the judgment, then it is the exercise of a power by the delegate which had not been conferred, and the delegate possessed no inherent power of the character here exercised; nor could such an act become valid by receiving the sanction of a majority vote of the people. A citizen of the United States, in time of peace, has a right, under the constitution of the United States, to have his rights to property made the subject of adjudication and investigation by no other tribunal than one which is a part of a government republican in form, such as a court of the United States, or of a State, where the judicial powers of government are confided to a recognized judicial department, controlled in their judgments by the law of the land; nor can the people, by a simple majority vote, give validity to the void act of a body of delegates which deprives the citizen of his property without due process of law.—*Ibid*..... 417

11. The 22d section of an act known as the Internal Improvement Act authorized Board of County Commissioners to subscribe for stock in railroad companies, and to issue bonds, bearing interest, for the purpose of paying the subscription, and requires the commissioners to levy an annual tax to meet the interest as it becomes due. The county of Columbia, in 1855, subscribed for such stock, and issued its bonds. Simultaneously, the Supreme Court of the State, in a case before it involving the validity of the law, pronounced it constitutional, and the county continued the issuing of its bonds until the whole amount authorized was issued: *Held*, That upon application for a writ of *mandamus* against it the commissioners to compel the levy of a tax to pay the interest, by a *bona fide* holder of coupons representing the interest due upon these bonds, they having been issued under the sanction of the highest judicial authority of the State, and the acquiescence of the people of the county, it is too late to question the constitutionality of the law and the validity of the bonds in the hands of a *bona fide* holder, and that a judgment of the court now, declaring the law unconstitutional, would not affect the bonds heretofore so issued, but would operate only upon the future. *County Commissioners Columbia County vs. King*..... 418

12. Serving a portion of the territory of a county by act of the Legislature, and the freeing of slaves by the sovereign power of the State, thus lessening the aggregate value of the taxable property in

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a county, do not constitute a taking of "private property for public use without just compensation."—*Ibid*..... 451

13. The first section of "an act providing for the stay of executions in this State," approved Dec. 13, 1861, providing that "there shall be no sales under execution and judgments at common law or decrees in Chancery in this State, until twelve months after peace is made and proclaimed or until otherwise provided by law, between the Confederate States of America and the United States of America, except by the consent of the defendant or defendants," provided, that in cases of levy the "defendant be required to give bond with security for the forthcoming of the property on or at the time above specified," is void as contravening the spirit of the constitution of the United States recognizing the establishment of the Confederate government, and contemplating the dismemberment and destruction of the Union of the States. *Garlington vs Priest*..... 559

14. The act of the Legislature of 1866, authorizing Judges of the Circuit Courts to hold extra and special terms whenever in their judgment the public welfare and the cause of justice requires it, is not repugnant to the letter or spirit of the present Constitution of the State. *Barber vs. State*..... 675

CONTEMPT—

1. When an appeal is taken and a supersedeas allowed from an order appointing a receiver, *pendente lite*, the power of the Court making the order and its officers is suspended in reference to the order appealed from, and the order remains inoperative pending the appeal. Any action or proceeding by any person under such order, in disregard and defiance of the force and effect of the supersedeas, after notice thereof or after service of a writ of supersedeas, is a contempt of the authority and jurisdiction of the appellate Court.—*State vs. Johnson*..... 33

CONTINUANCE—

1. An application for a second continuance upon an affidavit which discloses the fact that the witnesses reside and are beyond the limits of the State, may be refused for that reason, and such refusal forms no ground for the granting of a new trial upon an appeal by this court. *Gladden vs. State*..... 623

2. When an affidavit for a continuance fails to show that the testimony of an absent witness is material, it forms no ground for a continuance.—*Ibid* 623

3. A judgment will not be reversed on account of the refusal of the court to grant a continuance, unless there appears to have been an arbitrary and oppressive exercise of the discretion vested in the Circuit Court. *Barber vs. State*..... 675

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CONTRACT—

1. In March, 1861, A agreed to purchase of B certain lots in Tallahassee, Florida, and improvements to be constructed thereon by B. The sum agreed to be paid was an estimated value of the lots and the actual cost of the improvements. After the execution of this agreement, B removes to the State of Maryland, leaving an agent in Florida. A remains in Florida, giving his personal attention to the work, having authority from B to make such additions or alterations in the original plan as he desired. Additions and alterations were made by A. In July, 1865, (between which date, and the date of the completion of the improvements, communication between Maryland and Florida was suspended by war,) B, in Maryland, received a letter from his agent in Florida and sought A, then in Maryland, for a settlement. A settlement was made, and a deed subsequently executed for the property. In making such settlement it was the expressed intention of neither party to suffer any considerable loss, nor to surrender any right under the original contract. Through a mistake in the construction of a sentence in the letter of the agent, a final settlement was had, and a note given for a much less sum than was due. This note B, with the consent of A, transferred to C, in payment of a balance due by him (B) for the lots which he (B) had purchased of C. The sentence erroneously construed related to the cost of the alterations in the original plan made by A, of which B was uninformed, and which, from the acts and language of A, he was authorized to believe were inconsiderable while the proofs show they amounted to a considerable amount: *Held*,

That in such case a court of equity should open the settlement; that the true balance ascertained to be due was a balance of purchase money due upon a sale of real estate; that while the estate at law passed under the deed to the vendee, yet in equity the vendor retained a lien for the balance of the purchase money. *Latrobe et al. vs. Hayward* 190

2. That B having used the note of A, given him in the settlement, to pay a balance due by him (B) to the party from whom he purchased the lots, did not affect his (B's) lien for the balance of the purchase money due him (B) by A, over and above the amount of the note.—*Ibid.*..... 190

3. Where there are equities arising from contract, or by operation of law, by virtue of which the plaintiff is entitled to subject specific property to sale, the courts of the State where the property is situated have jurisdiction, although none of the parties are residents of the State where the property is. In such a case the jurisdiction attaches to the thing, and can only be brought into action where the thing is.—*Ibid.*..... 190

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4. A bargains and sells to B one-half of a stock of goods not then in his actual possession. B bargains to pay A one-half of the cost of the goods, and one-half of the charges incurred and to be incurred thereon. The cost and charges are to be ascertained at a future time: *Held*, That acts remained to be done between buyer and seller before the sale could be considered complete, and that no present right of property passed. In the same instrument containing the above bargain and sale, there was an agreement between the parties to sell the stock of goods as co-partners: *Held*, That it was necessary that a property should pass to the vendee before such partnership could exist *inter se*, and that the vendor had a right to insist upon payment for the goods before the vendee acquired an interest as partner: *Held further*, That acts which may be attributed to common courtesy and to the confidence which generally exists between persons who have agreed to enter into the intimate confidential relation of partners, should not be held to be a waiver of those conditions necessary to be performed before that relation is to exist under contract. *Johnston et al. vs. Eichelberger*..... 230

5. A promissory note indorsed after due, is transferred subject to the same conditions as to demand of payment and notice of dishonor as though it were indorsed before due. The indorsement is a conditional contract to pay in the event of a demand, or due diligence to make a demand, on the maker and his default.—*Bemis vs. McKenzie* 553

6. Where a bond was given in 1861 for the forthcoming of slaves levied upon by execution, the condition of which was that the slaves should be delivered twelve months after peace should be made and proclaimed between the Confederate States and the United States of America: *Held*, That the happening of the contingency mentioned was a condition governing the liability of the obligors, and that no breach of the condition having occurred, no action can be maintained upon the bond. *Garlington vs. Priest*..... 559

COSTS—

1. The statute referred to makes it a condition of the transmission of the papers by the clerk, that the costs shall be first paid, and if the condition be not complied with on the part of the party procuring the order of transfer, and the clerk should refuse or neglect to transmit the papers for that reason, any other party may, on proper application, have the first order revoked and the cause removed to any proper circuit on complying with the statute. *Sweptson et. al. vs. Call & Baker*.....337

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COUNTY COURT—

1. Where there has been a suggestion of insolvency filed in the County Court, and notice calling in creditors, one creditor has an equity to enjoin proceedings under a judgment at law obtained by another creditor, after suggestion of insolvency filed in the County Court. *Scarlett vs. Hicks et. al.*..... 314
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CREDITORS—

1. The rule at common law is that the goods and personal chattels of the wife, which were actually beneficially possessed by her in her own right at the time of her marriage, and such other goods and personal chattels as come to her during coverture, vest absolutely in the husband. The separate property of the wife is that of which she has the exclusive control, independent of her husband, and the proceeds of which she may dispose of as she pleases. *Alston et. al. vs. Rowles*..... 117
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3. Where property is purchased and paid for by the husband, and a deed is taken in the name of the wife, such acts, coupled with an existing indebtedness of the husband, make a prima facie case of fraud. In such case the creditor can follow the funds of the debtor and subject the property in the hands of the wife or her legal representatives, unless the presumption of fraud is negated by the condition of the debtor and his circumstances at the time, or other rebutting evidence.—*Ibid.*..... 117

4. When a party has two funds out of which he can satisfy his debt, and a junior creditor has a lien upon one of the funds only, the first creditor will, in equity, be compelled to resort to that fund which the junior creditor cannot reach, so that the junior creditor may avail himself of his only security, where it can be done without injustice or injury to the debtor or creditor. *Ritch vs. Eichelberger et. al.*..... 169

(See Fraudulent Conveyances, 5.)

CRIMINAL LAW AND PRACTICE—

1. The act of the Legislature of 1868, relating to jurors, provides that the County Commissioners of each county shall make a list of 300 names of persons qualified to serve as jurors, from which list the grand and petit jurors are to be drawn. The Commissioners of Jackson county furnished a list to the Clerk of 302 names, from which the grand and petit jury were drawn: *Held*, That this was an irregularity, forming a proper ground of challenge to the array of the petit jury. *Gladden vs. The State.*..... 623

2. Where the whole number of any grand or petit jury are not summoned, it is the duty of the court to direct the clerk to draw a sufficient number to complete the jury from the list furnished by the County Commissioners in the same manner as provided by law for the drawing in the first instance, and to issue a venire for the summoning of the persons so drawn. (Sections 5 and 32, act of 1868 relating to jurors.)—*Ibid.*..... 623

3. A special venire for talesmen to form a jury for the trial of a cause, when a sufficient number of jurors regularly drawn and summoned cannot be obtained by reason of challenge or otherwise, is proper, and the court may cause jurors to be summoned from the bystanders or from the county at large to complete the panel. (Section 21, act of 1868.)—*Ibid.*..... 623

4. An application for a second continuance upon an affidavit which discloses the fact that the witnesses reside and are beyond

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CHANGE OF VENUE—

1. In applying for a change of venue in criminal cases upon the ground that a fair trial cannot be had in the county, the statute contemplates that facts shall be stated which satisfy the court that the motion is well founded. But whether this court can review the action of the Circuit Court in the exercise of its discretion in this matter, *quære?* *Barber vs. State*..... 675

CIRCUIT COURT—

1. The County Court, not having the power to enjoin execution of a judgment at law rendered by the Circuit Court, a Court of Chancery may grant relief by injunction without removing the administration of the assets of an estate to its own jurisdiction. *Scarlett vs. Hicks et al.*..... 314
2. An injunction continues, under the practice in this State, for the time fixed by the order granting it, and if no time is limited, until the hearing, unless it is sooner dissolved. There are no terms of the court for chancery proceedings. The court, under the statute, is always open for such proceedings, whether interlocutory or final.—*Ibid.*..... 314
3. The Circuit Court, independent of express legislation, has the power to re-establish a judgment roll or entry when the original record is lost or destroyed. *Pearce vs. Thackeray*..... 574

CODE OF PROCEDURE—

1. When, before the adoption of the Code of Procedure, a cause was referred by the Circuit Court to a practising attorney as referee, in pursuance of the 17th section of Art. VI of the Constitution, to be tried and determined by him; and upon a hearing of the cause upon the law and facts he made his decision and filed the same, with a record of his proceedings, in the office of the clerk of the Circuit Court in vacation, such decision does not become a final judgment of the Court without further action of the Court thereon, and an appeal cannot be taken from the decision of the referee to the Supreme Court as from a final judgment. *Chambers vs. Savage et al.*.... 585
(See Practice under the Code.)

COMPTROLLER—

1. Where provision is made by law for the salary of an officer, the drawing of a warrant by the Comptroller is a ministerial act, which may be enforced by mandamus, and the Court may, in such proceeding, determine whether the appointment of the officer is void, where there is no other incumbent of the office exercising its functions by color of right. *State ex rel. Weeks vs. Gamble*..... 9

CONFLICT OF LAWS—

1. The laws of another State upon a subject matter in litigation is considered to be the same as the law of this State, until shown by due allegation and proof to be otherwise. *Bemis vs. McKenzie*..... 553

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CONSTITUTIONAL CONVENTION—

1. The courts of this State derive their jurisdiction from the State Constitution. They cannot assume jurisdiction not granted, or which is denied, although the effect may be that the obligation of a contract cannot be enforced. The jurisdiction of the courts is no part of the obligation of a contract. The last clause of section 26, article xvi of the Constitution, provides that "all judgments and decrees rendered in any of the courts of this State since the 10th day of January, A. D. 1861, upon all deeds or bills of sale, or upon any bond, bill, note, or other evidence of debt, based upon the sale or purchase of slaves, are hereby declared set aside, and the plea of failure of consideration shall be held a good defence in all actions to said suit." *Held*,

That this action is legislative, not judicial; that it prescribes a rule for the action of the courts in reference to a particular class of judgments upon their records; that it is a law operating retrospectively upon the contract; that its effect is to make that which was a good consideration for a contract, at the time and place it was entered into, not a good consideration; that this is to destroy the obligation of the contract, and it is therefore void. The abolition of slavery or the emancipation of the slave does not destroy the right of action which a vendor of the slave so emancipated has against the vendee, who owned the slave at the time of his emancipation, and any action of a convention of this character, which directs the courts to hold otherwise, is void, as it impairs the obligation on the contract. *McNealy vs. Gregory*..... 417

2. If the purpose of the convention in this clause was to destroy all the right of the plaintiff in execution in this judgment, as a punishment for making this species of property the subject of sale, or for any other act, then, viewed in the aspect, it becomes a bill of pains and penalties, and is void.—*Ibid*..... 417

3. If it is regarded as the exercise of judicial power by the convention, the result of which is to set aside the judgment, then it is the exercise of a power by the delegate which had not been conferred, and the delegate possessed no inherent power of the character here exercised; nor could such an act become valid by receiving the sanction of a majority vote of the people. A citizen of the United States, in time of peace, has a right, under the Constitution of the United States, to have his rights to property made the subject of adjudication and investigation by no other tribunal than one which is a part of a government republican in form, such as a court of the United States, or of a State, where the judicial powers of government are confided to a recognized judicial department, controlled in their judgments by the law of the land; nor can the people, by a simple majority vote, give validity to the void act of a body of dele-

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gates which deprive the citizen of his property without due process of law.—*Ibid*..... 417

CONSTITUTIONAL LAW—

1. Section 7, and Article V, of the Constitution of this State, provides that "when any office, from any cause, shall become vacant and no mode is provided by this Constitution, or by the laws of the State, for filling such vacancy, the Governor shall have power to fill such vacancy by granting a commission, which shall expire at the next election:" *Held*,
That the power vested in the Governor by this section is not a power to fill any office for the *unexpired term*; that this power remains with the people, and that the power here conferred is to provide an incumbent for the office between the date of the removal or death of the regular incumbent, and the filling of the office by an election by the people. *State ex. rel. Weeks vs. Gamble, Comptroller*..... 9

2. That while the Constitution does not fix the precise time for the "next election," yet it is the duty of the authorities to see that the time of this election is not indefinitely postponed at the expense of the rights of the people.—*Ibid*..... 9

3. The Constitution of this State, (1868,) Article VI, Section 5, provides that "The Court shall have power to issue writs of mandamus, certiorari, prohibition, quo warranto, habeas corpus, and also all writs necessary or proper to the complete exercise of the appellate jurisdiction. Each of the Justices shall have power to issue writs of habeas corpus to any part of the State," &c.: *Held*,
That this is a general grant of power to use certain writs in the exercise of its jurisdiction, and that it is competent for the Legislature to prescribe the manner of obtaining and issuing process, and to provide that such process may be issued out of the Supreme Court in vacation as well as in term time; and the provisions of the Constitution do not repeal or invalidate acts of preceding Legislatures, authorizing Justices and Judges to allow supersedeas, writs of error, and other process, and prescribing the effect of such process.—*State vs. Johnson*..... 33

4. The fourth section of the act approved January 24, 1851, authorizing a judge of one circuit to make orders in suits pending in another circuit in vacation, when the judge of the latter circuit is under the disabilities mentioned in the act, is not in conflict with the constitution of 1868. The order made by the judge of another circuit is *pro hac vice*, the order of the court in which the cause is pending, and such order must be filed therein. *Swepton et. al. vs. Call & Baker*..... 337

5. The Constitutional Convention of 1865 ordained, and the ordinance was incorporated in the constitution, "that no law of this State providing that claims or demands against the estates of dece-

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dents shall be barred if not presented within two years, shall be considered as in force within this State between the 10th of January, 1861, and the 25th October, 1865:" *Held*, that the convention of 1865 was called for the purpose of amending the constitution of the State to conform to the then existing political condition of the country, and not for the purposes of general or special legislation, and that the provisions of such an ordinance could have no legal force. *Bradford vs. Shine*..... 393

6. The Legislature may repeal a statute limiting the time for commencing civil actions, and thus deprive a party of the right to plead the statute as a defence.—*Ibid*..... 393

7. The law provides that all debts and demands against the estate of any testator or intestate, which shall not be exhibited within two years after notice given to that effect by the executor or administrator, shall forever afterward be debarred: *Held*, that the repeal of this statute, after the expiration of the time so limited, does not revive the right to prosecute the claim, nor deprive the representative of a deceased person of his right to plead the bar, the right of action being extinguished in such case.—*Ibid*..... 393

8. The courts of this State derive their jurisdiction from the State constitution. They cannot assume jurisdiction not granted, or which is denied, although the effect may be that the obligation of a contract cannot be enforced. The jurisdiction of the courts is no part of the obligation of a contract. The last clause of section 26, article xvi, of the constitution, provides that "all judgments and decrees rendered in any of the courts of this State since the 10th day of January, A. D. 1861, upon all deeds or bills of sale, or upon any bond, bill, note, or other evidence of debt, based upon the sale or purchase of slaves, are hereby declared set aside, and the plea of failure of consideration shall be held a good defence in all actions in said suit:" *Held*,

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9. If the purpose of the convention in this clause was to destroy all the right of the plaintiff in execution in this judgment, as a punishment for making this species of property the subject of sale, or for any other act, then, viewed in this aspect, it becomes a bill of pains and penalties, and is void.—*Ibid.*..... 417

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11. The 22d section of an act known as the Internal Improvement Act authorized Board of County Commissioners to subscribe for stock in railroad companies, and to issue bonds, bearing interest, for the purpose of paying the subscription, and requires the commissioners to levy an annual tax to meet the interest as it becomes due. The county of Columbia, in 1855, subscribed for such stock, and issued its bonds. Simultaneously, the Supreme Court of the State, in a case before it involving the validity of the law, pronounced it constitutional, and the county continued the issuing of its bonds until the whole amount authorized was issued: *Held*, That upon application for a writ of *mandamus* against it the commissioners to compel the levy of a tax to pay the interest, by a *bona fide* holder of coupons representing the interest due upon these bonds, they having been issued under the sanction of the highest judicial authority of the State, and the acquiescence of the people of the county, it is too late to question the constitutionality of the law and the validity of the bonds in the hands of a *bona fide* holder, and that a judgment of the court now, declaring the law unconstitutional, would not affect the bonds heretofore so issued, but would operate only upon the future. *County Commissioners Columbia County vs. King.*..... 415

12. Serving a portion of the territory of a county by act of the Legislature, and the freeing of slaves by the sovereign power of the State, thus lessening the aggregate value of the taxable property in

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a county, do not constitute a taking of "private property for public use without just compensation."—*Ibid*..... 451

13. The first section of "an act providing for the stay of executions in this State," approved Dec. 13, 1861, providing that "there shall be no sales under execution and judgments at common law or decrees in Chancery in this State, until twelve months after peace is made and proclaimed or until otherwise provided by law, between the Confederate States of America and the United States of America, except by the consent of the defendant or defendants," provided, that in cases of levy the "defendant be required to give bond with security for the forthcoming of the property on or at the time above specified," is void as contravening the spirit of the constitution of the United States recognizing the establishment of the Confederate government, and contemplating the dismemberment and destruction of the Union of the States. *Garlington vs Priest*..... 559

14. The act of the Legislature of 1866, authorizing Judges of the Circuit Courts to hold extra and special terms whenever in their judgment the public welfare and the cause of justice requires it, is not repugnant to the letter or spirit of the present Constitution of the State. *Barber vs. State*..... 675

CONTEMPT—

1. When an appeal is taken and a supersedeas allowed from an order appointing a receiver, *pendente lite*, the power of the Court making the order and its officers is suspended in reference to the order appealed from, and the order remains inoperative pending the appeal. Any action or proceeding by any person under such order, in disregard and defiance of the force and effect of the supersedeas, after notice thereof or after service of a writ of supersedeas, is a contempt of the authority and jurisdiction of the appellate Court.—*State vs. Johnson*..... 33

CONTINUANCE—

1. An application for a second continuance upon an affidavit which discloses the fact that the witnesses reside and are beyond the limits of the State, may be refused for that reason, and such refusal forms no ground for the granting of a new trial upon an appeal by this court. *Gladden vs. State*..... 623

2. When an affidavit for a continuance fails to show that the testimony of an absent witness is material, it forms no ground for a continuance.—*Ibid* 623

3. A judgment will not be reversed on account of the refusal of the court to grant a continuance, unless there appears to have been an arbitrary and oppressive exercise of the discretion vested in the Circuit Court. *Barber vs. State*..... 675

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it devolves upon the creditors of the wife seeking to establish a separate estate in property acquired prior to 1845, to show that the gift was accompanied by some instrument or unequivocal declaration to the effect that it was to and for the separate use of, the wife, free from the control of the husband.—*Ibid.*..... 117

3. Where property is purchased and paid for by the husband, and a deed is taken in the name of the wife, such acts, coupled with an existing indebtedness of the husband, make a prima facie case of fraud. In such case the creditor can follow the funds of the debtor and subject the property in the hands of the wife or her legal representatives, unless the presumption of fraud is negated by the condition of the debtor and his circumstances at the time, or other rebutting evidence.—*Ibid.*..... 117

4. When a party has two funds out of which he can satisfy his debt, and a junior creditor has a lien upon one of the funds only, the first creditor will, in equity, be compelled to resort to that fund which the junior creditor cannot reach, so that the junior creditor may avail himself of his only security, where it can be done without injustice or injury to the debtor or creditor. *Ritch vs. Eichelberger et. al.*..... 169

(See Fraudulent Conveyances, 5.)

CRIMINAL LAW AND PRACTICE—

1. The act of the Legislature of 1868, relating to jurors, provides that the County Commissioners of each county shall make a list of 300 names of persons qualified to serve as jurors, from which list the grand and petit jurors are to be drawn. The Commissioners of Jackson county furnished a list to the Clerk of 302 names, from which the grand and petit jury were drawn: *Held*, That this was an irregularity, forming a proper ground of challenge to the array of the petit jury. *Gladden vs. The State.*..... 623

2. Where the whole number of any grand or petit jury are not summoned, it is the duty of the court to direct the clerk to draw a sufficient number to complete the jury from the list furnished by the County Commissioners in the same manner as provided by law for the drawing in the first instance, and to issue a venire for the summoning of the persons so drawn. (Sections 5 and 32, act of 1868 relating to jurors.)—*Ibid.*..... 623

3. A special venire for talesmen to form a jury for the trial of a cause, when a sufficient number of jurors regularly drawn and summoned cannot be obtained by reason of challenge or otherwise, is proper, and the court may cause jurors to be summoned from the bystanders or from the county at large to complete the panel. (Section 21, act of 1868.)—*Ibid.*..... 623

4. An application for a second continuance upon an affidavit which discloses the fact that the witnesses reside and are beyond

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the limits of the State, may be refused for that reason, and such refusal forms no ground for the granting of a new trial upon an appeal by this court.—*Ibid*..... 623

5. Where an affidavit for a continuance fails to show that the testimony of an absent witness is material, it forms no ground for a continuance.—*Ibid*. 623

6. The circuit judge charged the jury, on the request of counsel for the State on the trial of an indictment for murder, that "if the State proved a deliberate killing, not the mere fact of killing, then it was for the prisoner to prove that it was not murder, and if he has failed to do so, you will find the prisoner guilty." *Held*, That this charge was erroneous. It should have been qualified by adding, in substance, "unless the circumstances showing that the killing was not murder, or other grade of crime, appeared by the testimony produced by the prosecutor."—*Ibid*..... 623

7. An irregularity in the drawing or summoning of a grand jury (as that the grand jury was drawn from a list of 302 names instead of 300 as provided by the statute,) may be taken advantage of by plea in abatement to the indictment, which plea must be interposed before pleading in bar.—*Ibid*..... 623

8. The plea of the prisoner in a capital case must precede the swearing of the jury. *Dixon vs. State*..... 631

9. When there is sufficient in the record to show the presence of the prisoner in court during the proceedings, the omission to read the indictment to the prisoner, and to demand of the prisoner whether he is guilty or not guilty of the charge, is waived by his pleading to the indictment.—*Ibid*..... 631

10. The prisoner having entered the plea of not guilty, concluding to the country, the addition of the similiter by the State is not essential to the regularity of the conviction, and its omission does not authorize an arrest of the judgment.—*Ibid*..... 631

11. Under an indictment for homicide, where the prosecutor seeks to introduce a dying declaration of the deceased in evidence, it should be first shown to the satisfaction of the court that at the time the declarations were made the deceased not only evidently considered himself in imminent danger, but that he evidently believed he was without hope of recovery. The circumstances under which the statements were made must be shown, in order that the court may determine whether the statements should be given to the jury as dying declarations. *Dixon vs State*..... 636

12. The admissions and declarations of a person accused of crime are competent evidence, and may be proven without first showing that no promise or threat had been held out or made to the accused to induce him to make the statements. If they shall be shown to

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have been made under improper promises or threats they should not be received, or if already proved, the testimony should be rejected. *Ibid.* 636

13. It is not error for the Court to refuse to allow the question to be put to a witness, "whether it was not *possible* that he might have misunderstood what the prisoner said."—*Ibid.*..... 636

14. It is error to allow a witness to give his "understanding" of the meaning of declarations made to him by a person accused of crime, unless the witness is an interpreter or expert.—*Ibid.*..... 636

15. The person killed being a policeman, it is competent to give in evidence on a trial for murder threats of violence made by the accused shortly before the homicide against "policeman," though not particularly against the individual killed.—*Ibid.*..... 636

16. The question put to a witness, "Would you deem a man to be of sound memory and discretion who, under the circumstances, would make use of such an expression as he made in your store?" was properly overruled.—*Ibid.*..... 636

17. It is not error for the Court to refuse to repeat instructions already given to the jury.—*Ibid.*..... 636

18. The Court charged the jury that "when the killing has been proved, the accused must show that it was attended, with circumstances of accident, necessity, or infirmity, to reduce it to a lower grade of crime," the accused being charged with murder: *Held*, That the Court should have added substantially, "unless they arise out of the evidence produced against him." Without such qualification the charge of the Court was erroneous, and calculated to mislead the jury, notwithstanding the Judge may have given the instruction correctly in a former portion of the charge.—*Ibid.*..... 636

19. The jury having returned into Court, asked the instruction of the Court upon a particular question, and the Court gave them an instruction verbally and afterwards reduced it to writing from memory: *Held*, That under the statutes, the charge and instructions of the court to the jury must be first reduced to writing, and given to them as written.—*Ibid.*..... 636

20. The court should give counsel an opportunity to reduce to writing any special instruction, relating to points contained in his charge or instructions, and should give in writing his own ruling of the law upon the points raised as presented, and declare the same to the jury.—*Ibid.*..... 636

21. It is not error to permit the jury to take with them, when they retire to deliberate, the written charge and instructions of the court, provided they take the whole of them.—*Ibid.*..... 636

22. Where facts are in issue under the pleadings, it is the exclusive province of the jury, under the statute regulating criminal proceedings in this State, to determine whether such facts are establish-

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ed by the testimony; therefore, in a prosecution for "receiving stolen goods, knowing the same to have been stolen," a charge of the court that "the place, the date, the value of the property, and the fact that a bale of cotton was stolen, have been fully established," is erroneous. *Collins vs. State*..... 651

23. It should appear that the indictment was delivered into court by a grand jury. In case the Clerk omits to make a minute of the fact of the delivery of the indictment into court by the grand jury, the court may order it to be done at any time during the term. *Query*: Whether such a minute is essential, or whether the fact of delivery does not sufficiently appear by the endorsement of the foreman of the grand jury, the indictment itself, and the file mark of the Clerk?—*Ibid.* 651

24. The record contains the following: "The grand jury came in to open court and made the following presentment: State of Florida vs. James E. Collins—Receiving stolen goods, knowing the same to have been stolen." The indictment properly endorsed follows this entry. The prisoner is arraigned, tried, and convicted; *Held*, That it sufficiently appears from the record that the prisoner was tried in accordance with the Constitution "on presentment and indictment by a grand jury," and that the indictment was delivered into court by the grand jury—*Ibid.*..... 651

25. The finding of a bill by the grand jury is shown by the endorsement of the foreman, to the effect that it is "a true bill." The endorsement is made under the law only "when so found" by the grand jury, and this act of the foreman being made by the statute the evidence that the bill was so found, courts cannot properly enlarge the statute or require evidence in addition to that prescribed by the statute, to show the finding of the grand jury.—*Ibid.*..... 651

26. The finding of the bill is not an act of the grand jury in open court, and it is not essential to the regularity of the proceedings in the court below that a special record entry or minute of the finding should be made in that court; nor is it essential that the extended record brought to this court by a writ of error should contain the finding endorsed on the bill. All that is required of the extended record which should be returned to this court with the writ of error is, that what that record contains shows, according to the accepted legal signification of the terms in which it is framed, that the grand jury presented to the court an indictment for the particular felony with which the party is charged.—*Ibid.*..... 651

27. The Supreme Court has no appellate jurisdiction in cases of misdemeanor, and an appeal from a judgment of conviction had in the Circuit Court must be dismissed: *Held*, That the jurisdiction of the Circuit Court, in cases of misdemeanor, is appellate only. *Sutton vs. State*..... 678

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CRIMINAL LAW AND PRACTICE—(Continued.)

28. An indictment for larceny of chattels should show the time and place of the commission of the offence, and the value of the property alleged to be stolen; and if either be omitted, the defect is incurable. *Morgan vs. State*..... 671
29. Under the statute prescribing a punishment for "fraudulently marking an unmarked animal, with intent to claim the same, or to prevent identification by the owner," an indictment should set forth the offence in the language of the statute, the intent to defraud being the essence of the offence. A charge that defendant "wilfully and feloniously marked an unmarked animal," is not sufficient.—*Ibid.*..... 671
30. The laws of 1868, (p. 68, § 43.) provide as follows: Whoever, without lawful authority, forcibly or secretly confines or imprisons another person within this State against his will, &c., shall be punished by imprisonment in the State penitentiary not exceeding ten years. The indictment charges that the defendant "did forcibly confine and imprison within this State against his will, one George Base:" *Held*, That the indictment failing to charge that the confinement and imprisonment was "without lawful authority," does not allege an offence under the statute or at common law. *Barber vs. State* 675
31. A judgment will not be reversed on account of the refusal of the court to grant a continuance, unless there appears to have been an arbitrary and oppressive exercise of the discretion vested in the Circuit Court.—*Ibid.*..... 675
32. In applying for a change of venue in criminal cases upon the ground that a fair trial cannot be had in the county, the statute contemplates that facts shall be stated which satisfy the court that the motion is well founded. But whether this court can review the action of the Circuit Court in the exercise of its discretion in this matter, *quere?*—*Ibid.*..... 675
33. The challenge of a juror for cause does not preclude the exercise of the right of peremptory challenge afterwards.—*Ibid.*..... 675
34. It is the duty of a court under the laws of this State to hear any competent evidence in support of a valid objection to the competency of a juror, as by the examination of witnesses, and the like.—*Ibid.*..... 675
35. A person indicted for unlawfully imprisoning or confining another, may show in his defence or justification that the party confined or imprisoned was committing an offence, and that the arrest or confinement was for the purpose of taking the offender before a magistrate. The circumstances attending the arrest may be shown by the party arrested or confined, unless he decline to answer for lawful reasons.—*Ibid.*..... 675

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CRIMINAL LAW AND PRACTICE—(Continued.)

36. When, under the act of 1865, the defendant in a criminal case has been allowed by the court to make a statement of the matter of his defence under oath, before the jury, it is error for the court to charge the jury that they "cannot take such statement into consideration as evidence." The jury may take such statement into consideration, and attach to it such importance as in their judgment it may be entitled to. The court has only to judge of the propriety of allowing the defendant to make the statement.—*Ibid.*..... 675

37. A charge to the jury that if they "find that the defendant forcibly imprisoned or confined another without legal authority, against his will, and that it was within this State, then it is your duty to find him guilty," is erroneous. The offence must be shown to have been committed within the county named in the indictment.—*Ibid.*..... 675

38. The act of the Legislature of 1866, authorizing Judges of the Circuit Courts to hold extra and special terms whenever in their judgment the public welfare and the cause of justice require it, is not repugnant to the letter or spirit of the present Constitution of this State.—*Ibid.*..... 675

DAMAGES—

1. The general rule, as to damages in trover, is the value at the time and place of conversion, with legal interest to the date of the verdict. *Robinson vs. Hartridge.*..... 501

2. Unliquidated damages resulting from a tort cannot be made available as a set-off in an action of assumpsit; nor is evidence of such a tort admissible under a plea of set-off of moneys had and received, or moneys due for goods sold and delivered. *Hall et al. vs. Penny*..... 601

DEED—

1. A deed of conveyance of lands, executed by a person out of possession is void as against a party holding adverse possession. *Doe ex dem. Magruder et al. vs. Roe.*..... 603

2. A deed of conveyance executed by the Trustees of the Internal Improvement Fund does not carry with it a presumption that the title was in them and that they could lawfully convey the premises. Their title is not original, and, like that of any other party, should be proved and is subject to be overcome by a superior title.—*Ibid.*..... 603

DESCENTS—

1. The law of descents in 1838 provided that the real estate of intestates should descend in parcenary to the male and female kindred in a certain course, viz: 1, to children; 2, to the father; 3, to the mother, brothers, and sisters; 4, for want of these or their descendants, to paternal and maternal kindred in moieties, &c. In that

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year provision was made by law, that personal property should be distributed according to the law regulating descents." In 1829, the previous law of descents was repealed and re-enacted, with *provisos*, (Duval's Compilation, 361,) that whenever an infant shall die with out issue, having title to any real estate of inheritance derived from the father, and if there be living any kindred on the side of the father of the infant, such estate shall pass to the father or the paternal kindred, without regard to the mother or maternal kindred, save in the mother's right of dower. And if the real estate of such infant was derived from the mother, the same should descend to the mother or maternal kindred, without regard to the father or paternal kindred: *Held*, That the act of 1828 adopting "the law regulating descents" as the rule for the distribution of personal estate, applies to any law regulating descents in force at the time that the right to the distribution becomes vested, (agreeing with *Jones vs. Dexter*, 8 Fla. 276.) *Bushnell vs. Denison*..... 77

2. The *provisos* contained in the act of 1829, entitled "An Act Regulating Descents," being paragraphs 10 and 11 of section 1, are part of the law regulating descents, and furnish a rule for the distribution of the personal estate of an infant, derived from the father or the mother, as the case may be, it being the intent of the law that the personal estate should be distributed by the same rule that governs the descent of real estate.—(Overruling the decision in *Jones vs. Dexter*.) *Ibid*..... 77

DISTRIBUTION OF PERSONAL ESTATES—

1. The *provisos* contained in the act of 1829, entitled "An Act Regulating Descents," being paragraphs 10 and 11 of section 1, are part of the law regulating descents, and furnish a rule for the distribution of the personal estate of an infant, derived from the father or the mother, as the case may be, it being the intent of the law that the personal estate should be distributed by the same rule that governs the descent of real estate.—(Overruling the decision in *Jones vs. Dexter*.) *Bushnell vs. Denison*,..... 77

DIVORCE—

1. A statement in a bill for divorce that the complainant is, and has been for more than two years a resident of this State; that the parties were married at Jacksonville, in this State, in April 1862, "where the parties have ever since lived," is a full compliance, as to the pleadings, with the statute, which requires that "it shall appear that such applicant has resided in the State of Florida for the space of two years prior to the term of such application," and is a sufficient allegation of the time of marriage.—*Burns vs. Burns*..... 369

2. Where a divorce is prayed on the ground that the defendant "is habitually intemperate," it is not necessary to specify more de-

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nitely the facts constituting "habitual intemperance," the charge of itself implying that the defendant has a persistent habit of becoming intoxicated from the use of strong drinks, and thus rendering his presence in the marital relation disgusting and intolerable.—*Ibid*..... 369

3. Where the charge in a bill for divorce is that the defendant "habitually indulges in violent and ungovernable temper, and is extremely cruel to his wife," and proceeds to specify that he uses threatening, blasphemous and abusive language towards her, on many occasions threatened her with fatal violence, and attempted to carry his threats into execution, so that she has had to seek safety in flight; and in an amended bill reiterating these charges, it is alleged that the defendant has put and continues to keep complainant in fear of bodily harm from his violence and abuse: *Held*, That the defendant having taken direct issue upon these statements, and proceeded to a final hearing without requiring a more definite specification of facts, and the allegations appearing to be sufficiently definite to appraise the defendant of the nature of the facts to be proved in order to enable him to prepare his defence, and it appearing that the proofs fully substantiate the charge, a decree of divorce will be sustained.—*Ibid*. 369

4. Where a decree of divorce has been passed, an appeal taken, and supersedeas awarded, a court of equity should not award an injunction to control the operation of the supersedeas.—*Burns vs. Sanderson and Burns*,..... 381

DYING DECLARATIONS—

1. Under an indictment for homicide, where the prosecutor seeks to introduce a dying declaration of the deceased in evidence, it should be first shown to the satisfaction of the Court that at the time the declarations were made the deceased not only evidently considered himself in imminent danger, but that he evidently believed he was without hope of recovery. The circumstances under which the statements were made must be shown, in order that the Court may determine whether the statements should be given to the jury as dying declarations. *Dixon vs. State*..... 699

EJECTMENT—

1. A defendant in ejectment may show twenty years possession by himself, and those under whom he holds, adverse to the possession of the plaintiff and those under whom he claims, and if the plaintiff has not been prevented from prosecuting his claim within the twenty years by reason of some legal disability, he cannot recover. *Doe ex dem. Magruder et al. vs. Roe*..... 608

ELECTION—

1. The object of the law creating a Board of Canvassers of election returns is to ascertain from the returns the whole number of

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votes cast, and to determine therefrom and certify the result of the election. They are required by law to meet at a given day for this purpose, and may adjourn from day to day until their duties are completed; and in case legal returns are received by them at any time before they complete the canvass, which would have been counted if received by the day appointed by law, it is their duty to include them in the canvass and certificate, and if they refuse, they may be required by the writ of mandamus to complete the canvass of all the returns received, and to certify the result according to law. *State ex rel. Bloxham vs. Board of State Canvassers*..... 55

2. A peremptory mandamus will not be granted upon the return of an alternative writ, unless the respondents may be required to do all that is required by the alternative writ, and therefore where the alternative writ required all the members of a Board of Canvassers to canvass the returns and declare the result of an election, and after that that one of them in another official capacity should record the proceedings of the Board, and issue a certificate thereon, the peremptory writ was refused; for, until an officer shall have neglected or refused to perform a duty, he cannot be proceeded against by this writ, and the officer who may be required to give a certificate of the proceedings of a Board cannot be so required until the Board shall have acted.—*Ibid*..... 55

3. Pending the proceedings by mandamus against a Board of Canvassers, the Legislature repealed the law creating such Board, without saving proceedings or duties required by law to be performed by them and uncompleted: *Held*, That the power of the Board to proceed was gone, and therefore the proceedings against them were dismissed.—*Ibid*. 55

4. An injunction restraining a Board of Canvassers from proceeding to canvass and certify the result of an election until the further order of the Judge granting the same, where the statute requires the Board to proceed by a certain day, is unauthorized.—*Ibid*..... 55
(See Constitutional Law, 2.)

EQUITY—

1. While, according to the strict rule of the common law, a freehold estate cannot be created to commence *in futuro*, and antenuptial settlement by the husband of real property upon the wife, in consideration of marriage, under which a freehold estate is to vest in the wife upon the marriage, cannot operate as a feoffment at common law, yet the instrument will operate as a covenant to stand seized to the use of the person named, and a Court of Equity will secure the wife in the enjoyment of such estate as passes under the deed. *Caulk vs. Fox and Wife*..... 148

2. While equity will construe a marriage settlement differently

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from its terms, and vary their strict legal signification in many cases in favor of the issue, upon the presumed intention of the parties to provide for the issue, the same rule is not applicable where the contest is between collaterals, devisees under the will of the husband on the one side, and the wife on the other.—*Ibid*..... 148

3. In such a contest, if the words used in the preamble and premises of the deed operate to pass a fee simple, and the *habendum* of the deed is inconsistent with the grant in the premises, inconsistent with itself, and uncertain, and such a construction carries out what in the opinion of the court was the real intention of the parties under existing circumstances, the preamble and premises will control, and an estate in fee simple passes.—*Ibid*..... 148

4. When a party has two funds out of which he can satisfy his debt, and a junior creditor has a lien upon one of the funds only, the first creditor will, in equity, be compelled to resort to that fund which the junior creditor cannot reach, so that the junior creditor may avail himself of his only security, where it can be done without injustice or injury to the debtor or creditor. *Ritch vs. Eichelberger et al*..... 169

5. In March, 1861, A agreed to purchase of B certain lots in Tallahassee, Florida, and improvements to be constructed thereon by B. The sum agreed to be paid was an estimated value of the lots and the actual cost of the improvements. After the execution of this agreement, B removes to the State of Maryland, leaving an agent in Florida. A remains in Florida, giving his personal attention to the work, having authority from B to make such additions or alterations in the original plan as he desired. Additions and alterations were made by A. In July, 1865, (between which date and the date of the completion of the improvements, communication between Maryland and Florida was suspended by war,) B, in Maryland, received a letter from his agent in Florida, and sought A, then in Maryland, for a settlement. A settlement was made, and a deed subsequently executed for the property. In making such settlement it was the expressed intention of neither party to suffer any considerable loss, nor to surrender any right under the original contract. Through a mistake in the construction of a sentence in the letter of the agent, a final settlement was had, and a note given for a much less sum than was due. This note B, with the consent of A, transferred to C, in payment of a balance due by him (B) for the lots which he (B) had purchased of C. The sentence erroneously construed related to the cost of the alterations in the original plan made by A, of which B was uninformed, and which, from the acts and language of A, he was authorized to believe were inconsiderable, while the proofs show they amounted to a considerable amount: *Held*, That in such a case a court of equity should open the settle-

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ment; that the true balance ascertained to be due was a balance of purchase money due upon a sale of real estate; that while the estate at law passed under the deed to the vendee yet in equity the vendor retained a lien for the balance of the purchase money. *La-Trobe et al. vs. Hayward*..... 190

6. That B, having used the note of A, given him in the settlement, to pay a balance due by him (B) to the party from whom he purchased the lots, did not affect his (B's) lien for the balance of the purchase money due him (B) by A, over and above the amount of the note.—*Ibid*..... 190

7. Where there are equities arising from contract, or by operation of law, by virtue of which the plaintiff is entitled to subject specific property to sale, the courts of the State where the property is situated have jurisdiction, although none of the parties are residents of the State where the property is. In such a case the jurisdiction attaches to the thing and can only be brought into action where the thing is.—*Ibid*..... 190

(See Injunction.)

8. When the defendant answers a bill in equity, reserving the questions of law, and at the final hearing the court is of opinion that there is not such a case made by bill as will warrant relief, the bill should be dismissed. Judgment was entered in the county court in 1842, upon a promissory note made by defendant. No legal service of the summons was made upon defendant; but an unauthorized attorney entered an appearance for defendant at the return of the summons, and defendant alleges that he had no knowledge of the existence of the judgment until twenty years after it was entered; after which the judgment was revived by *scire facias*, and execution issued and levied upon defendant's property. Upon bill filed by defendant in 1868, alleging these facts, and seeking to enjoin the enforcement of the judgment, but failing to show that the defendant had a legal or equitable defence against the note sued on: *Held*, That where the statute of limitations has intervened as to an action upon the note, equity will not relieve against a judgment upon the ground that the appearance of the attorney, upon which the judgment was based, was unauthorized; the party must show, under such circumstances, fraud, or a meritorious defence as well as irregularity. *Budd vs. Gamble*..... 265

9. Courts of equity will not interfere by injunction to stay proceedings upon a writ of *mandamus*. County Commissioners Columbia county vs. Bryson *et al*..... 281

10. An injunction will not be granted if the party seeking it could, by proper vigilance, have protected himself by the ordinary means at law, or where the case in equity proceeds upon a defence equally available at law.—*Ibid*..... 281

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EQUITY—(Continued.)

11. Where the land of one is levied upon to satisfy the debt of another a bill for injunction may be maintained to restrain the sale, notwithstanding the party injured may have an action at law, an actual sale having the effect of bringing a cloud upon his title and affecting the value of the property to an extent not easily susceptible of measurement or redress at law.—*Budd vs. Long*..... 286
12. A Court of Equity will not enjoin a judgment and execution on the ground that there were errors and irregularities in the proceedings anterior to judgment the correction of such errors being the proper subject of motion or writ of error.—*Ibid*..... 286
13. A bill in chancery was filed praying that the record of a judgment at law and an execution thereon which had been destroyed by fire, might be re-established or supplied by copies thereof, and that a copy of the execution might be placed in the hands of the sheriff in lieu of the one destroyed: *Held*, On demurrer to the bill, that the power to supply a new record when the original has been lost or destroyed, pertains to the court in which the record was made, and is an inherent power in courts of general jurisdiction; and a court of equity has no jurisdiction to supply or establish the record of a court of law which has been lost or destroyed. *Kenn et al. vs. Jordan*..... 327
14. Where the legal estate is in the trustee, actions founded upon the legal title must be brought in his name. So also has the trustee the right at law to institute all proceedings authorized by statute or otherwise, to redress injuries to his possession, and to evict defaulting tenants. *Burns vs. Sanderson & Burns*..... 381
15. That defendant "has interfered and intermeddled with the property, and still continues to do so, and has and still continues to forbid the tenants and lessees to pay the rents to the plaintiff, and has forcibly entered one of the buildings on the premises," does not lay a foundation for an injunction. There are clear remedies at law for a failure of a lessee to pay rent. The forcible entry is remediable at law also, and the terms "interfering and intermeddling" do not disclose a case of threatened trespass, accompanied with irreparable injury or other circumstances calling for the aid of a court of equity.—*Ibid*. 381
16. An offer to perform in part the covenant to pay rent, on condition that the lessor will abate the residue of the rent, to-wit: the rent accrued during the time the tenant was deprived of the use of the premises by the violence of war, is not a legal defence, nor a "defence upon equitable grounds" under the statute. *Robinson vs. L'Engle* 428
17. A plea of *set-off* of damages sustained by defendant growing out of a conspiracy against him, entered into by plaintiff and others,

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will not be sustained on demurrer. A set-off can be allowed in an action on contract, of matters only growing out of contract, express or implied.—*Ibid*..... 482

18. Where there has been a suggestion of insolvency filed in the County Court, and notice calling in creditors, one creditor has an equity to enjoin proceedings under a judgment at law obtained by another creditor, after suggestion of insolvency filed in the County Court. *Scarlett vs. Hicks, et al.*..... 314

19. That the chancellor, before granting an injunction, has failed to require an exhibit of a claim alleged to be in writing or in this case an exhibit of a copy of the claim filed in the County Court, and a copy of the proceedings in that court, is not ground for a dissolution of the injunction.—*Ibid*..... 314

20. It is irregular, and sanctioned by no rule of Chancery practice, to direct a special issue as to the lunacy of a party upon particular dates to be tried in a court of law upon an *ex parte* petition of a friend of the lunatic. *Whitlock vs. Chandler*..... 385

21. Two methods of investigating the subject of the lunacy of a party are known to Chancery practice. One is where the matter of lunacy becomes a subject of inquiry in a cause pending. In this case the chancellor may and usually does direct an issue to be tried in a court of law to try the question of the lunacy of the party. The other is where a commission *de lunatico inquirendo* is awarded upon an *ex parte* petition of a friend of the alleged lunatic. Some of the incidents of each method considered.—*Ibid*..... 385

ESTATES OF DECEASED PERSONS—

1. The law provides that all debts and demands against the estate of any testator or intestate which shall not be exhibited within two years after notice given to that effect by the executor or administrator, shall forever afterward be barred: *Held*, That the repeal of this statute, after the expiration of the time so limited, does not revive the right to prosecute the claim, nor deprive the representative of a deceased person of his right to plead the bar, the right of action being extinguished in such case. *Bradford vs. Shine*..... 393

2. The Constitutional Convention of 1865 ordained, and the ordinance was incorporated in the Constitution, "that no law of this State providing that claims or demands against the estates of decedents shall be barred if not presented within two years, shall be considered as in force within this State between the 10th January, 1861, and the 25th October, 1865:" *Held*, That the convention of 1865 was called for the purpose of amending the constitution of the State to conform to the then existing political condition of the country, and not for purposes of general or special legislation, and that the provisions of such an ordinance could have no legal force.—*Ibid*..... 393

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ESTATES OF DECEASED PERSONS—(Continued.)

3. The statute of December 13th, 1861, suspended the statute of limitation then in force "in relation to civil actions:" *Held*, That this suspension applied only to *civil actions*, according to the ordinary legal and popular signification and understanding of the terms, and did not apply to the presentation of claims against the estates of deceased persons.—*Ibid*..... 393

ESTOPPEL—

1. When an agent of the plaintiffs made an affidavit for the purpose of procuring a writ of attachment, and upon a traverse of the affidavit it was shown, and not denied, that the statement of the amount due was based upon the admission of the defendant to the agent, the defendant is estopped from insisting upon a motion to dissolve the writ of attachment, that a sum less than that so admitted and stated in the affidavit was actually due. *Zinn et al. vs. Dzilynski* 597

EVIDENCE—

1. In civil suits, generally, presumptive evidence, as distinguished from direct evidence of marriage, is *prima facie* sufficient, as where a man and woman have cohabited together, speaking habitually to and of each other as husband and wife, and of the time and circumstances of their marriage, and the like; but in suits where criminal conversation, adultery, &c., constitute the essence or foundation of the action, a more rigid rule is required. *Burns vs. Burns*..... 369
2. The volumes of "American State Papers," published under the authority of Congress, containing copies and translations of the original grants or concessions of lands by the Spanish government, are as valid evidence in the investigation of claims to lands in courts of justice as though they were authenticated in any other mode recognized by law. *Doe ex dem. Magruder et al. vs. Roe*..... 602
3. A copy of a document or record, duly certified by the officer legally in possession of the original, is lawful evidence, on general principles, equally with the original.—*Ibid*..... 602
4. It is not error for the court to refuse to allow the question to be put to a witness, "whether it was not possible that he might have misunderstood what the prisoner said." *Dixon vs. State*..... 631
5. It is error to allow a witness to give his "understanding" of the meaning of declarations made to him by a person accused of crime, unless the witness is an interpreter or expert.—*Ibid*..... 631
6. The person killed being a policeman, it is competent to give in evidence on a trial for murder threats of violence made by the accused, shortly before the homicide, against "policeman," though not particularly against the individual killed.—*Ibid*..... 631
7. The question put to witness, "Would you deem a man to be of sound memory and discretion who, under the circumstances,

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would make use of such an expression as he made in your store?"
was properly overruled.—*Ibid.*..... 631

8. The admissions and declarations of a person accused of crime are competent evidence, and may be proven without first showing that no promise or threat had been held out or made to the accused to induce him to make the statements. If they shall be shown to have been made under improper promises or threats, they should not be received, or if already proved, the testimony should be rejected.—*Ibid.*..... 631

9. When, under the act of 1865, the defendant in a criminal case has been allowed by the court to make a statement of the matter of his defence under oath, before the jury, it is error for the court to charge the jury that they "cannot take such statement into consideration as evidence." The jury may take such statement into consideration, and attach to it such importance as in their judgment it may be entitled to. The court has only to judge of the propriety of allowing the defendant to make the statement. *Barber vs. State.*..... 675

(See Dying Declarations.)

EXECUTION—

1. A sheriff was required by a rule of court to report what action had been taken under an execution, and reported on oath that he had sold property of the defendant in judgment and execution, (who was an administratrix,) and had realized a sum of money from said sale, but that he had, before sale of the property, been notified of the fact that the administratrix had filed notice of the insolvency of the estate in the Probate Court, and that such notice of insolvency was on file in the records of said Probate Court; whereupon on the motion of the attorney of the plaintiffs in the judgment and execution, the court ordered the sheriff to pay over to the said attorney the money realized on said execution from such sale, or stand committed as for contempt, and the sheriff paid over said moneys under the order: *Held*, That the return of the sheriff that a suggestion of the insolvency of said estate had been duly made and filed in the Probate Court, tendered an issue to the rule, and the peremptory order to pay over the money to the attorney without inquiring into the truth of the return was an error, and if such suggestion of insolvency had in fact been filed by the administratrix, it was unlawful to direct the sheriff to pay the money to the attorney, as the money represented assets of the insolvent estate and should be distributed *pro rata* in the settlement. *Matthews, Sheriff, vs. Williams.*..... 615

2. When money has been thus paid over, and the order is reversed or set aside, the court should require the money to be restored, and is clothed with power to enforce restitution by summary process.—*Ibid.*..... 615

(See Constitutional Law, 13.)

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FALSE IMPRISONMENT—

1. A person indicted for unlawfully imprisoning or confining another, may show in his defence or justification that the party confined or imprisoned was committing an offence, and that the arrest or confinement was for the purpose of taking the offender before a magistrate. The circumstances attending the arrest may be shown by the party arrested or confined, unless he declines to answer for lawful reasons. *Barber vs. State*..... 675
2. A charge to the jury that if they "find that the defendant forcibly imprisoned or confined another without legal authority, against his will, and that it was within this State, then it is your duty to find him guilty," is erroneous. The offence must be shown to have been committed within the county named in the indictment.—*Ibid*..... 675

FORCIBLE ENTRY AND DETAINER—

1. That "act for the relief of occupying claimants," approved January 12, 1849, has no application to proceedings under the act relating to forcible entry and detainer. *Mountain vs. Roche*..... 581

FRAUDULENT CONVEYANCES—

1. Where property is purchased and paid for by the husband, and a deed is taken in the name of the wife, such acts coupled with an existing indebtedness of the husband make a *prima facie* case of fraud. In such case the creditor can follow the funds of the debtor and subject the property in the hands of the wife or her legal representatives, unless the presumption of fraud is negatived by the condition of the debtor and his circumstances at the time, or other rebutting evidence: *Alston et al. vs. Rowles*..... 117
2. The rule at common law is that the goods and personal chattels of the wife, which were actually beneficially possessed by her in her own right at the time of her marriage, and such other goods and personal chattels as come to her during coverture, vest absolutely in the husband. The separate property of the wife is that of which she has the exclusive control, independent of her husband, and the proceeds of which she may dispose of as she pleases.—*Ibid*..... 117
3. Where a gift of personal property to the wife during coverture is established, it is presumed, in the absence of testimony to the contrary, to be a gift as her general and not her separate property. In a contest between creditors of the husband and creditors of the wife, it devolves upon the creditors of the wife seeking to establish a separate estate in property acquired prior to 1845, to show that the gift was accompanied by some instrument or unequivocal declaration to the effect that it was to and for the separate use of the wife, free from the control of the husband.—*Ibid*..... 117
4. Where a husband purchases real estate, taking the deed in the name of his wife, his declaration that the purchase is made as the

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agent of his wife, and that the money paid is his wife's, is not sufficient to establish a purchase with funds belonging to the separate estate of the wife—*Ibid*..... 117

5. *Held*, (by a majority of the court,) that the representatives of a deceased partner stand in the relation of a creditor of the surviving partner, who assumes control of the partnership effects, to the extent of the value of the interest of the deceased partner after satisfying the partnership debts; and the doctrine that a voluntary gift or conveyance or a voluntary post-nuptial settlement by a person indebted is *prima facie* fraudulent as to the creditors of the debtor, applies as well in behalf of the representatives of the deceased partner, as in behalf of general creditors—*Ibid*..... 117

FREE PERSONS OF COLOR—

1. A free colored person was not, in the year 1863, prohibited by law from taking titles to or owning *real estate in this State*. *Budd vs. Long* 388

GOVERNOR—

1. Section 7, and Article V, of the Constitution of this State, provides that "when any office, from any cause, shall become vacant and no mode is provided by this Constitution, or by the laws of the State, for filling such vacancy, the Governor shall have power to fill such vacancy by granting a commission, which shall expire at the next election:" *Held*, That the power vested in the Governor by this section is not a power to fill any office for the *unexpired term*; that this power remains with the people, and that the power here conferred is to provide an incumbent for the office between the date of the removal or death of the regular incumbent, and the filling of the office by an election by the people. *State ex rel. Weeks vs. Gamble*,..... 9

2. That while the Constitution does not fix the precise time for the "next election," yet it is the duty of the authorities to see that the time of this election is not indefinitely postponed at the expense of the rights of the people.—*Ibid*..... 9

GRAND JURY—

1. The act of the Legislature of 1866, relating to jurors, provides that the County Commissioners of each county shall make a list of 300 names of persons qualified to serve as jurors, from which list the grand and petit jurors are to be drawn. The Commissioners of Jackson county furnished a list to the Clerk of 303 names, from which the grand and petit jury were drawn: *Held*, That this was an irregularity, forming a proper ground of challenge to the array of the petit jury. *Gladden vs. The State*..... 623

2. Where the whole number of any grand or petit jury are not summoned, it is the duty of the court to direct the clerk to draw a

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sufficient number to complete the jury from the list furnished by the County Commissioners in the same manner as provided by law for the drawing in the first instance, and to issue a venire for the summoning of the persons so drawn. (Sections 5 and 32, act of 1868 relating to jurors.)—*Ibid*..... 623

3. An irregularity in the drawing or summoning of a grand jury (as that the grand jury was drawn from a list of 302 names instead of 300 as provided by the statute,) may be taken advantage of by plea in abatement to the indictment, which plea must be interposed before pleading in bar.—*Ibid*..... 623

4. It should appear that the indictment was delivered into court by a grand jury. In case the Clerk omits to make a minute of the fact of the delivery of the indictment into court by the grand jury, the court may order it to be done at any time during the term. *Query*: Whether such a minute is essential, or whether the fact of delivery does not sufficiently appear by the endorsement of the foreman of the grand jury, the indictment itself, and the file mark of the Clerk?—*Collins vs. State*..... 631

5. The record contains the following: "The grand jury came into open court and made the following presentment: State of Florida vs. James E. Collins—Receiving stolen goods, knowing the same to have been stolen." The indictment properly endorsed follows this entry. The prisoner is arraigned, tried, and convicted: *Held*, That it sufficiently appears from the record that the prisoner was tried in accordance with the Constitution "on presentment and indictment by a grand jury," and that the indictment was delivered into court by the grand jury.—*Ibid*..... 651

6. The finding of a bill by the grand jury is shown by the endorsement of the foreman, to the effect that it is "a true bill." The endorsement is made under the law only "when so found" by the grand jury, and this act of the foreman being made by the statute the evidence that the bill was so found, courts cannot properly enlarge the statute or require evidence in addition to that prescribed by the statute, to show the finding of the grand jury.—*Ibid*..... 651

7. The finding of the bill is not an act of the grand jury in open court, and it is not essential to the regularity of the proceedings in the court below that a special record entry or minute of the finding should be made in that court; nor is it essential that the extended record brought to this court by a writ of error should contain the finding endorsed on the bill. All that is required of the extended record which should be returned to this court with the writ of error is, that what that record contains shows, according to the accepted legal signification of the terms in which it is framed, that the grand jury presented to the court an indictment for the particular felony with which the party is charged.—*Ibid*..... 651

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HEIRS AT LAW—

1. That the act of 1828 adopting "the law regulating descents" as the rule for the distribution of personal estate applies to any law regulating descents in force at the time that the right to the distribution becomes vested, (agreeing with *Jones vs. Dexter*, 8 Fla. 276.) *Bushnell vs. Denison*..... 77
2. The *provisos* contained in the act of 1829, entitled "An Act Regulating Descents," being paragraphs 10 and 11 of section 1, are part of the law regulating descents, and furnish a rule for the distribution of the personal estate of an infant, derived from the father or the mother, as the case may be, it being the intent of the law that the personal estate should be distributed by the same rule that governs the descent of real estate.—(Overruling the decision in *Jones vs. Dexter*.) *Ibid*..... 77
(See Limitations.)

HUSBAND AND WIFE—

1. Where property is purchased and paid for by the husband, and a deed is taken in the name of the wife, such acts coupled with an existing indebtedness of the husband make a *prima facie* case of fraud. In such case the creditor can follow the funds of the debtor and subject the property in the hands of the wife or her legal representatives, unless the presumption of fraud is negatived by the condition of the debtor and his circumstances at the time, or other rebutting evidence. *Alston et al. vs. Rowles*..... 117
2. The rule at common law is that the goods and personal chattels of the wife, which were actually beneficially possessed by her in her own right at the time of her marriage, and such other goods and personal chattels as come to her during coverture, vest absolutely in the husband. The separate property of the wife is that of which she has the exclusive control, independent of her husband, and the proceeds of which she may dispose of as she pleases. *Ibid*..... 117
3. Where a gift of personal property to the wife during coverture is established, it is presumed, in the absence of testimony to the contrary, to be a gift as her general and not her separate property. In a contest between creditors of the husband and creditors of the wife, it devolves upon the creditors of the wife seeking to establish a separate estate in property acquired prior to 1845, to show that the gift was accompanied by some instrument or unequivocal declaration to the effect that it was to and for the separate use of the wife, free from the control of the husband.—*Ibid*..... 117
4. Where a husband purchases real estate, taking the deed in the name of his wife, his declaration that the purchase is made as the agent of his wife, and that the money paid is his wife's is not sufficient to establish a purchase with funds belonging to the separate estate of the wife.—*Ibid*..... 117

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HUSBAND AND WIFE—(Continued.)

5. *Held*, (by a majority of the court,) that the representatives of a deceased partner stand in the relation of a creditor of the surviving partner, who assumes control of the partnership effects, to the extent of the value of the interest of the deceased partner after satisfying the partnership debts; and the doctrine that a voluntary gift or conveyance of a voluntary post-nuptial settlement by a person indebted, is *prima facie* fraudulent as to the creditors of the debtor, applies as well in behalf of the representatives of the deceased partner, as in behalf of general creditors—*Ibid*..... 117

6. While, according to the strict rule of the common law, a freehold estate cannot be created to commence *in futuro*, and an antenuptial settlement by the husband of real property upon the wife, in consideration of marriage, under which a freehold estate is to vest in the wife upon the marriage, cannot operate as a feoffment at common law, yet the instrument will operate as a covenant to stand seised to the use of the person named, and a Court of Equity will secure the wife in the enjoyment of such estate as passes under the deed. *Cault vs. Fox and Wife*..... 148

7. While equity will construe a marriage settlement differently from its terms; and vary their strict legal signification in many cases in favor of the issue, upon the presumed intention of the parties to provide for the issue, the same rule is not applicable where the contest is between collaterals, devisees under the will of the husband on the one side, and the wife on the other.—*Ibid*..... 148

8. In such a contest, if the words used in the preamble and premises of the deed operate to pass a fee simple, and the *habendum* of the deed is inconsistent with the grant in the premises, inconsistent with itself, and uncertain, and such a construction carries out what in the opinion of the court was the real intention of the parties under existing circumstances, the preamble and premises will control, and an estate in fee simple passes.—*Ibid*..... 148

9. In civil suits, generally, presumptive evidence, as distinguished from direct evidence of marriage, is, *prima facie*, sufficient, as where a man and woman have cohabited together, speaking habitually to and of each other as husband and wife, and of the time and circumstances of their marriage; and the like; but in suits where criminal conversation, adultery, &c., constitute the essence of foundation of the action, a more rigid rule is required. *Burns vs Burns*..... 369

INDICTMENT—

1. It should appear that the indictment was delivered into court by a grand jury. In case the Clerk omits to make a minute of the fact of the delivery of the indictment into court by the grand jury, the court may order it to be done at any time during the term. *Query*: Whether such a minute is essential, or whether the fact of

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delivery does not sufficiently appear by the endorsement of the foreman of the grand jury, the indictment itself, and the file mark of the Clerk? *Collins vs. State*..... 651

2. The record contains the following: "The grand jury came into open court and made the following presentment: State of Florida vs. James E. Collins—Receiving stolen goods, knowing the same to have been stolen." The indictment properly endorsed follows this entry. The prisoner is arraigned, tried, and convicted: *Held*, That it sufficiently appears from the record that the prisoner was tried in accordance with the Constitution "on presentment and indictment by a grand jury," and that the indictment was delivered into court by the grand jury.—*Ibid*..... 651

3. The finding of a bill by the grand jury is shown by the endorsement of the foreman, to the effect that it is "a true bill." The endorsement is made under the law only "when so found" by the grand jury, and this act of the foreman being made by the statute the evidence that the bill was so found, courts cannot properly enlarge the statute or require evidence in addition to that prescribed by the statute, to show the finding of the grand jury.—*Ibid*..... 651

4. The finding of the bill is not an act of the grand jury *in open court*, and it is not essential to the regularity of the proceedings in the court below that a special record entry or minute of the finding should be made in that court; nor is it essential that the extended record brought to this court by a writ of error should contain the finding endorsed on the bill. All that is required of the extended record which should be returned to this court with the writ of error is, that what that record contains shows, according to the accepted legal signification of the terms in which it is framed, that the grand jury presented to the court an indictment for the particular felony with which the party is charged.—*Ibid*..... 651

5. An indictment for larceny of chattels should show the time and place of the commission of the offence, and the value of the property alleged to be stolen; and if either be omitted, the defect is incurable. *Morgan vs. State*..... 671

6. Under the statute prescribing a punishment for "fraudulently marking an unmarked animal, with intent to claim the same, or to prevent identification by the owner," an indictment should set forth the offence in the language of the statute, the intent to defraud being the essence of the offence. A charge that defendant "wilfully and feloniously marked an unmarked animal," is not sufficient.—*Ibid*. 671

(See Equity. See Mandamus. See Grand Jury.)

INJUNCTION—

1. A supersedeas granted upon an appeal from an order allowing a preliminary injunction and appointing a receiver *pendente lite*, sus-

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pends the operation of the order and prohibits the further action of the receiver in carrying out the mandate of the order from which the appeal is taken. *State vs. Johnson*..... 23

2. An injunction, restraining a Board of Canvassers from proceeding to canvass and certify the result of an election until the further order of the judge granting the same, where the statute requires the Board to proceed by a certain day, is unauthorized. *State ex rel. Bloxham vs. State Board of Canvassers*..... 35

3. An injunction will not be granted if the party seeking it could, by proper vigilance, have protected himself by the ordinary means at law, or where the case in equity proceeds upon a defence equally available at law. *County Commissioners Columbia County vs. Bryson, et al.*..... 38

4. Courts of equity will not interfere by injunction to stay proceedings upon a writ of mandamus.—*Ibid.*..... 38

5. Where the land of one is levied upon to satisfy the debt of another, a bill for injunction may be maintained to restrain the sale, notwithstanding the party injured may have an action at law, an actual sale having the effect of bringing a cloud upon his title and affecting the value of the property to an extent not easily susceptible of measurement or redress at law. *Budd vs. Long*..... 39

6. A Court of Equity will not enjoin a judgment and execution on the ground that there were errors and irregularities in the proceedings anterior to judgment, the correction of such errors being the proper subject of motion or writ of error.—*Ibid.*..... 39

7. An injunction continues, under the practice in this State, for the time fixed by the order granting it, and if no time is limited, until the hearing, unless it is sooner dissolved. There are no terms of the court for chancery proceedings. The court, under the statute, is always open for such proceedings, whether interlocutory or final. *Scarlett vs. Hicks, et al.*..... 314

8. To dissolve an injunction where the only relief to be obtained is a perpetual injunction staying proceedings at law, is equivalent to dismissing the bill. In such a case as this, where there is abundant equity in the bill, where some of the defendants are non-residents, and where a subpoena has been issued and served upon one of the defendants in person, and upon the attorney of the non-resident defendants, the injunction should not be dissolved upon the ground of delay in prosecuting the suit.—*Ibid.*..... 314

9. That a party procures the entry of his appearance with the statement that his appearance is special, does not alter the effect of the appearance if he contests the suit upon its merits. If, notwithstanding this entry, he contests the suit upon its merits in the court below, obtaining a judgment in his favor, and upon an appeal to this court

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contests the appeal upon its merits, he is in court for all purposes, and upon remanding the case will be held to file his defences in the regular order of pleading.—*Ibid.*..... 314

10. That defendant "has interfered and intermeddled with the property and still continues to do so, and has and still continues to forbid the tenants and lessees to pay the rents to the plaintiff, and has forcibly entered one of the buildings on the premises," does not lay a foundation for an injunction. There are clear remedies at law for a failure of a lessee to pay rent. The forcible entry is remediable at law also, and the terms "interfering and intermeddling" do not disclose a case of threatened trespass, accompanied with irreparable injury or other circumstances calling for the aid of a court of equity. *Burns vs. Sanderson & Burns*..... 381

(See Practice, 28-29.)

INSOLVENCY OF ESTATES—

1. A Sheriff was required by a rule of court to report what action had been taken under an execution, and reported on oath that he had sold property of the defendant in judgment and execution, (who was an administratrix,) and had realized a sum of money from said sale, but that he had, before sale of the property, been notified of the fact that the administratrix had filed notice of the insolvency of the estate in the Probate Court, and that such notice of insolvency was on file in the records of said Probate Court; whereupon on the motion of the attorney of the plaintiffs in the judgment and execution, the court ordered the Sheriff to pay over to the said attorney the money realized on said execution from such sale, or stand committed as for contempt, and the Sheriff paid over said moneys under the order: *Held*, That the return of the Sheriff that a suggestion of the insolvency of said estate had been duly made and filed in the Probate Court, tendered an issue to the rule, and the peremptory order to pay over the money to the attorney without inquiring into the truth of the return was an error, and if such suggestion of insolvency had in fact been filed by the administratrix, it was unlawful to direct the Sheriff to pay the money to the attorney, as the money represented assets of the insolvent estate and should be distributed *pro rata* in the settlement. *Matthews, Sheriff, vs. Williams*..... 613

2. When money has been thus paid over, and the order is reversed or set aside, the court should require the money to be restored, and is clothed with power to enforce restitution by summary process. *Ibid.*..... 613

(See Limitations.)

INSTRUCTIONS—

1. It is not error for the Court to refuse to repeat instructions already given to the jury. *Dixon vs. State*..... 636

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INSTRUCTIONS—(Continued.)

2. The jury having returned into Court asked the instruction of the Court upon a particular question, and the Court gave them an instruction verbally and afterwards reduced it to writing from memory: *Held*, That under the statutes, the charge and instructions of the Court to the jury must be first reduced to writing, and given to them as written.—*Ibid*..... 636
3. The Court should give counsel an opportunity to reduce to writing any special instruction, relating to points contained in his charge or instructions, and should give in writing his own ruling of the law upon the points raised as presented, and declare the same to the jury.—*Ibid*..... 636
4. It is not error to permit the jury to take with them, when they retire to deliberate, the written charge and instructions of the Court, provided they take the whole of them.—*Ibid*..... 636
5. Where facts are in issue under the pleadings, it is the exclusive province of the jury, under the statute regulating criminal proceedings in this State, to determine whether such facts are established by the testimony; therefore, in a prosecution for "receiving stolen goods, knowing the same to have been stolen," a charge of the court that "the place, the date, the value of the property, and the fact that a bale of cotton was stolen, have been fully established," is erroneous. *Collins vs. State*..... 631

INTERNAL IMPROVEMENT ACT—

(See Constitutional Law, 11.)

JUDGMENT—

1. Royall made a *bona fide* sale to L. and M. of a judgment and execution which was a lien upon property covered by a junior mortgage, under which execution the mortgaged property was improperly sold, after the transfer of the judgment and execution. In a suit in equity, instituted for the purpose of foreclosing the mortgage, and to set aside the sale under the execution, it is not necessary to make the original plaintiff, who had so parted with his interest in the judgment and execution, a party to the foreclosure suit, as he had no legal or equitable interest in the matter. *Ritch vs. Eichelberger et al.*.... 169
2. When a party has two funds out of which he can satisfy his debt, and a junior creditor has a lien upon one of the funds only, the first creditor will, in equity, be compelled to resort to that fund which the junior creditor cannot reach, so that the junior creditor may avail himself of his only security, where it can be done without injustice or injury to the debtor or creditor.—*Ibid*..... 169
3. After successive pleas have been held bad, on demurrer thereto, it is error to enter a judgment for want of a plea; the proper judgment is a final judgment on the demurrer. *Garlington vs. Priest*..... 339

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JUDGMENT—(Continued.)

4. Where the judgment of the Circuit Court is based upon a consideration of all the testimony adduced, and none of the testimony is properly brought before this Court, the judgment must be affirmed. *Penny vs. Holmes*..... 579

5. A decision of the Circuit Court overruling a demurrer in an "action for the recovery of money only," is not such an "order, decision, or judgment," as authorizes an appeal before final judgment under section 10 of the Code of Procedure. *Barkley vs. Russ*..... 589

6. All the persons named as plaintiffs or defendants in a joint judgment must join in prosecuting a writ of error, but if some refuse the others may prosecute it in the names of all without their consent. *Standley vs. Jaffray et al.*..... 596

(See Arrest of Judgment. See Jurisdiction, 12. See Mortgage.)

JURISDICTION—

1. Where there are equities arising from contract, or by operation of law, by virtue of which the plaintiff is entitled to subject specific property to sale, the courts of the State where the property is situated have jurisdiction, although none of the parties are residents of the State where the property is. In such a case the jurisdiction attaches to the thing, and can only be brought into action where the thing is. *La Trobe et al. vs. Hayward*..... 190

2. A bill in chancery was filed, praying that the record of a judgment at law and an execution thereon, which had been destroyed by fire, might be re-established or supplied by copies thereof, and that a copy of the execution might be placed in the hands of the sheriff in lieu of the one destroyed: *Held*, On demurrer to the bill, that the power to supply a new record when the original has been lost or destroyed, pertains to the court in which the record was made, and is an inherent power in courts of general jurisdiction; and a court of equity has no jurisdiction to supply or establish the record of a court of law which has been lost or destroyed. *Keen et al. vs. Jordan* 327

3. When a Judge of the Circuit Court orders the transfer of a cause to another circuit, under the provisions of "an act to provide for the more effectual administration of justice in this State," approved January 24, 1851, he should affirmatively state in the order of transfer, or in some other paper to be filed, the reason why the transfer is made, or the order will be irregular. *Swepton et al. vs. Call and Baker*..... 337

4. A judge has no jurisdiction of a cause in which he is interested, and can make no order therein except for the purpose of transferring it to some other circuit whereof the judge is qualified to try the cause, and if the judge of the circuit to which the cause is sent

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is also disqualified, *held*, that it is his duty to order the papers to be returned to the court from which they were sent, in order that some other circuit may be selected.—*Ibid*..... 337

5. The jurisdiction of the court in which a suit is commenced is not provided merely by an order of transfer under the act of January 24, 1851, nor does the court to which the transfer is directed to be made obtain jurisdiction until the papers reach the clerk of the court mentioned in the order.—*Ibid*..... 337

6. A civil cause is not pending in a court until the papers showing the existence of the cause are deposited with the clerk who has the custody of the records of the court having jurisdiction of the cause.—*Ibid*. 337

7. The requirements of a statute authorizing a transfer of a cause from one court to another must be strictly observed and everything necessary to transfer jurisdiction under the statute must appear in the record of the cause.—*Ibid*..... 337

8. The fourth section of the act approved January 24, 1851, authorizing a judge of one circuit to make orders in suits pending in another circuit in vacation, when the judge of the latter circuit is under the disabilities mentioned in the act, is not in conflict with the Constitution of 1868. The order made by the judge of another circuit is *pro hac vice* the order of the court in which the cause is pending, and such order must be filed therein.—*Ibid*..... 337

9. An order of a circuit judge in a cause supposed to be pending in another circuit is void, unless the cause is pending therein at the time the order is made.—*Ibid*..... 337

10. Where the statute prescribes a particular mode of serving the process, and that the officer's return shall show the precise manner of service, a return stating that the process is "served on the within named party," is not sufficient to authorize the entry of a judgment or decree. The statute must be strictly pursued in such cases, otherwise the court has not jurisdiction of the person of the party to be served. *Standley vs. Arnow*..... 361

11. The courts of this State derive their jurisdiction from the State constitution. They cannot assume jurisdiction not granted, or which is denied, although the effect may be that the obligation of a contract cannot be enforced. The jurisdiction of the courts is no part of the obligation of a contract. The last clause of section 26, article xvi, of the constitution, provides that "all judgments and decrees rendered in any of the courts of this State since the 10th day of January, A. D. 1861, upon all deeds or bills of sale, or upon any bond, bill, note, or other evidence of debt, based upon the sale or purchase of slaves, are hereby declared set aside, and the plea of failure of consideration shall be held a good defence in all actions in said suits." *McNealy vs. Gregory*..... 417

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JURISDICTION—(Continued.)

12. The Circuit Court has by the Constitution final appellate jurisdiction in all civil cases arising in the County Court, in which the amount in controversy is \$100 and upwards; and a writ of error to the Circuit Court brought for the purpose of bringing the judgment of that court affirming the judgment of the County Court in the case specified before the Supreme Court for review is unauthorized, and must be dismissed for want of jurisdiction. *Brillis et al. vs. Blumenthal*..... 577

13. An affidavit made for the purpose of procuring an attachment against the property of a debtor stated that "the defendant is justly indebted to the plaintiffs in the sum of \$1,829.95, which amount is now actually due; and that the affiant has reason to believe that the defendant will fraudulently part with his property before judgment can be recovered against him." The defendant, traversing this affidavit for the purpose of moving to dissolve the attachment, says that the affidavit made in behalf of the plaintiffs "is untrue, wherein it alleges that the defendant is indebted to the plaintiffs in the sum of \$1,829.95, and that the same is actually due; and that said affidavit is untrue wherein it alleges that the affiant has reason to believe that the defendant will fraudulently part with his property before judgment can be recovered against him." On trial of this issue before a jury, the court charged that "the plaintiff must prove the amount named in the affidavit, \$1,829.95, is actually due, and that he had reason to believe the defendant would fraudulently part with his property before judgment can be recovered against him:" *Held*, That the words "actually due" referred to the question whether the amount of indebtedness had actually become due and payable at the time, and not to the precise amount of the indebtedness; and if it was proved that the amount actually due was less than the amount stated, but sufficient to give the court jurisdiction, this is substantial affirmative proof of that branch of the issue, and the charge was too strict. *Zinn et al. vs. Dzialynski*..... 597

14. The Supreme Court has no appellate jurisdiction in cases of misdemeanor, and an appeal from a judgment of conviction had in the Circuit Court must be dismissed: *Held*, That the jurisdiction of the Circuit Court, in cases of misdemeanor, is appellate only. *Sutton vs. State*..... 670

JURY—

1. A special venire for talesmen to form a jury for the trial of a cause, when a sufficient number of jurors regularly drawn and summoned cannot be obtained by reason of challenge or otherwise, is proper, and the court may cause jurors to be summoned from the bystanders or from the county at large to complete the panel. (Section 21, act of 1868. *Gladden vs. State*..... 623

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JURY—(Continued.)

2. Where facts are in issue under the pleadings, it is the exclusive province of the jury, under the statute regulating criminal proceedings in this State, to determine whether such facts are established by the testimony; therefore, in a prosecution for "receiving stolen goods knowing the same to have been stolen," a charge of the court that "the place, the date, the value of the property, and the fact that a bale of cotton was stolen, have been fully established," is erroneous. *Collins vs. State*..... 651
3. The challenge of a juror for cause does not preclude the exercise of the right of peremptory challenge afterwards. *Barber vs. State* 675
4. It is the duty of a court under the laws of this State to hear any competent evidence in support of a valid objection to the competency of a juror as by the examination of witnesses and the like.—*Ibid*..... 675
(See Grand Jury. See Instructions.)

LANDLORD AND TENANT—

1. In an action upon an express covenant in a lease for the payment of rent, and without conditions, a plea that the lessee was "deprived of the beneficial use of the premises by the casualties and violence of war," does not show a defence to the action. The loss of the use of premises by fire, inundation, or external violence, will not exempt the tenant from his express contract to pay rent. *Robinson vs. L'Engle*..... 482
2. An offer to perform in part the covenant to pay rent on condition that the lessor will abate the residue of the rent, to-wit: the rent accrued during the time the tenant was deprived of the use of the premises by the violence of war, is not a legal defence, nor a "defence upon equitable grounds" under the statute.—*Ibid*..... 482

LEASE—

(See Landlord and Tenant.)

LIEN—

1. A levy by virtue of an ancillary attachment upon lands creates a lien upon the land, of which subsequent purchasers are bound to take notice, and an irregularity anterior to the issuing of the attachment does not affect the lien. *Budd vs. Long*..... 286
(See Vendor's Lien.)

LIMITATIONS—

1. That where the statute of limitations has intervened as to an action upon the note equity will not relieve against a judgment upon the ground that the appearance of the attorney upon which the judgment was based was unauthorized; the party must show, under such circumstances, fraud, or a meritorious defence as well as irregularity. *Budd vs. Gamble*..... 285

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LIMITATIONS—(Continued.)

2. The Legislature may repeal a statute limiting the time for commencing civil actions, and thus deprive a party of the right to plead the statute as a defence. *Bradford vs. Shine*..... 393

3. The law provides that all debts and demands against the estate of any testator or intestate, which shall not be exhibited within two years after notice given to that effect by the executor or administrator, shall forever afterward be debarred: *Held*, that the repeal of this statute, after the expiration of the time so limited, does not revive the right to prosecute the claim, nor deprive the representative of a deceased person of his right to plead the bar, the right of action being extinguished in such case.—*Ibid*..... 393

4. The Constitutional Convention of 1865 ordained, and the ordinance was incorporated in the constitution, "that no law of this State providing that claims or demands against the estates of decedents shall be barred if not presented within two years, shall be considered as in force within this State between the 10th of January, 1861, and the 25th October, 1865:" *Held*, that the convention of 1865 was called for the purpose of amending the constitution of the State to conform to the then existing political condition of the country, and not for the purposes of general or special legislation, and that the provisions of such an ordinance could have no legal force. *Ibid*. 393

5. The statute of December 13th, 1861, suspended the statute of limitations then in force "in relation to civil actions:" *Held*, that this suspension applied only to *civil actions*, according to the ordinary legal and popular signification and understanding of the terms, and did not apply to the presentation of claims against the estates of deceased persons.—*Ibid*..... 393

6. A defendant in ejectment may show twenty years possession by himself and those under whom he holds adverse to the possession of the plaintiff and those under whom he claims; and if the plaintiff has not been prevented from prosecuting his claim within the twenty years by reason of some legal disability, he cannot recover. *Doe ex dem. Magruder et al. vs. Roe*..... 602

(See Constitutional Law, 5, 6, 7.)

LUNACY—

1. It is irregular and sanctioned by no rule of Chancery practice, to direct a special issue as to the lunacy of a party upon particular dates to be tried in a court of law upon an *ex parte* petition of a friend of the lunatic. *Whitlock vs. Chandler*..... 385

2. Two methods of investigating the subject of the lunacy of a party are known to Chancery practice. One is where the matter of lunacy becomes a subject of inquiry in a cause pending. In this case, the chancellor may and usually does direct an issue to be tried in a court of law to try the question of the lunacy of the party.

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The other is where a commission *de lunatico inquirendo* is awarded upon an *ex parte* petition of a friend of the alleged lunatic. Some of the incidents of each method considered.—*Ibid.*..... 385

MANDAMUS—

1. Where provision is made by law for the salary of an officer, the drawing of a warrant by the Comptroller is a ministerial act, which may be enforced by mandamus, and the Court may, in such proceeding, determine whether the appointment of the officer is void, where there is no other incumbent of the office exercising its functions by color of right. State *ex rel.* Weeks vs. Gamble..... 9

2. This Court has the power to grant a writ of mandamus directing the Board of State Canvassers to re-assemble and complete a canvass of the returns of votes cast at a State election where they have neglected to make a complete canvass of the returns in their possession. State *ex rel.* Bloxham vs. Board of State Canvassers..... 55

3. The object of the law creating a Board of Canvassers of election returns is to ascertain from the returns the whole number of votes cast, and to determine therefrom and certify the result of the election. They are required by law to meet at a given day for this purpose, and may adjourn from day to day until their duties are completed; and in case legal returns are received by them at any time before they complete the canvass, which would have been counted if received by the day appointed by law, it is their duty to include them in the canvass and certificate, and if they refuse, they may be required by a writ of mandamus to complete the canvass of all the returns received, and to certify the result according to law.—*Ibid.*..... 55

4. A peremptory mandamus will not be granted upon the return of an alternative writ, unless the respondents may be required to do all that is required by the alternative writ, and therefore where the alternative writ required all the members of a Board of Canvassers to canvass the returns and declare the result of an election, and after that, that one of them in another official capacity should record the proceedings of the Board, and issue a certificate thereon, the peremptory writ was refused; for, until an officer shall have neglected or refused to perform a duty, he cannot be proceeded against by this writ, and the officer who may be required to give a certificate of the proceedings of a Board cannot be so required until the Board shall have acted.—*Ibid.*..... 55

5. An alternative writ of mandamus may be amended.—*Ibid.*..... 55

6. Pending the proceedings by mandamus against a Board of Canvassers, the Legislature repealed the law creating such Board, without saving proceedings or duties required by law to be performed by them and uncompleted: *Held*, That the power of the Board to proceed was gone, and therefore the proceedings against them were dismissed.—*Ibid.*..... 55

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Board to proceed was gone, and therefore the proceedings against them were dismissed.—*Ibid.*..... 55

7. A proceeding by *mandamus* does not abate by a change in the membership of the municipal body, as by the resignation of members of a Board of County Commissioners and the appointment of new members. County Commissioners Columbia County vs. Bryson *et al.*.... 281

8. Where a duty is imperatively required by law to be performed by ministerial officers, as the levying of a specific tax, no demand is necessary to lay the foundation of an application for a writ of *mandamus* to enforce it. County Commissioners Columbia County vs. King 451

9. *Mandamus* is the proper, because the only efficient remedy to enforce the collection of taxes to satisfy the interest due on bonds of a county, such bonds having been issued under a law requiring the levying of a tax for that purpose, and may be resorted to without first obtaining judgment, and the court has the power to ascertain the amount of the coupons without the intervention of a jury. *Ibid.* 451

10. The court is not authorized (in a proceeding by *mandamus* against a county to enforce the collection of a tax to meet the interest coupons of the bonds issued by the county,) to direct the collection of interest upon the coupons. The law under which the bonds were issued, requiring the County Commissioners to levy and collect a sum sufficient to meet the interest on the bonds, the court, by *mandamus*, will only direct them to do what the law required them to do. County Commissioners Columbia County vs. King..... 451

11. A peremptory writ of *mandamus* is not amendable. Its mandate must correspond with that of the alternate writ, and if that be defective, or claim too much, it may be amended.—*Ibid.*..... 451
(See Injunction.)

MARRIAGE—

1. In civil writs, generally, presumptive evidence, as distinguished from direct evidence of marriage is, *prima facie*, sufficient, as where a man and woman have cohabited together, speaking habitually to and of each other as husband and wife, and of the time and circumstances of their marriage, and the like; but in suits where criminal conversation, adultery, &c., constitute the essence or foundation of the action, a more rigid rule required. Burns vs. Burns..... 369.
(See Settlement.)

MORTGAGE—

1. Royall obtained judgment against Eichelberger, which was a lien upon all the real estate of E., consisting of several detached parcels, and execution was issued and levied upon the real property of E. Subsequently, E mortgaged a portion of the property to Rich.

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After this, S. H. & Co. obtained judgment against E. The sheriff, under the senior execution of Royall, advertised for sale the lands levied upon, including the mortgaged lands, the lands not mortgaged being ample to satisfy the Royall execution. Before, and at the time of the sale on the R. execution, L. and M. had purchased and were the owners of this Royall judgment and execution, and the mortgagee repeatedly tendered to them, and also to the sheriff, the amount due thereon, informing them of his mortgage lien, and of his desire to protect it, which tender was refused. The mortgagee then requested the sheriff to offer for sale the property levied on which was not included in the mortgage, or to offer any small fraction or subdivision of the property levied on, which the sheriff, under advice of the owner of, and of the defendant in the execution, refused to do. The sheriff then released from levy considerable property not mortgaged, and sold it under the C. H. & Co.'s junior execution, and offered for sale, and sold, against the protest of the mortgagee, the bulk of the mortgaged property, consisting of several distinct tracts in bulk, leaving unsold only a small part of the mortgaged property, of value entirely insufficient to secure the amount stated to be due on the mortgage, but sufficient to pay the amount due on the Royall execution: *Held*, That it was the duty of the sheriff to accept the tender of payment by the mortgagee, so that the mortgagee would not lose his security upon the mortgaged property: *Held further*, That it was the duty of the sheriff to have first sold the property of the defendant in execution not covered by the mortgage, and that the sale of the mortgaged property upon the execution while there was abundant other property levied on, out of which the execution could have been satisfied, was a legal fraud upon the rights of the mortgagee, and the purchaser, then being an owner of the judgment and execution, and having notice of all the facts, is not an innocent purchaser. *Ritch vs. Eichelberger*..... 169

MUNICIPAL CORPORATIONS—

1. If the council of a municipal corporation act within the scope of their authority in the grading and improving of streets, they are not liable at common law to an action of trespass or case by the owner of an adjoining lot, who may be injured by such improvement. *Dorman vs. City of Jacksonville*..... 538
2. Nor does a provision in the act of incorporation that the council must "make to the party injured by an improvement a just compensation," to be ascertained in such manner as is provided in the act, make the corporation liable to an action for such injury. There being no right of action at common law, the remedy created by the Legislature must be pursued.—*Ibid*..... 538
3. A declaration alleging that a city council, "contriving and unjustly intending to injure, prejudice and aggrieve the plaintiff, and to

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incommode and annoy him in the occupation and enjoyment of his property," dug away his sidewalk, destroyed his shade trees, and created a nuisance in front of his premises, shows a cause of action at common law, the acts thus charged being in violation of law, and is not demurrable under the city charter which authorizes the grading and improving of streets.—*Ibid*..... 538

MURDER—

1. The circuit judge charged the jury, on the request of counsel for the State on the trial of an indictment for murder, that, "if the State proved a deliberate killing, not the mere fact of killing, then it was for the prisoner to prove that it was not murder, and if he has failed to do so, you will find the prisoner guilty:" *Held*, That this charge was erroneous. It should have been qualified by adding, in substance, "unless the circumstances showing that the killing was not murder, or other grade of crime, appeared by the testimony produced by the prosecutor." *Gladden vs. State*..... 623

2. The court charged the jury that "when the killing has been proved, the accused must show that it was attended, with circumstances of accident, necessity, or infirmity, to reduce it to a lower grade of crime," the accused being charged with murder: *Held*, That the Court should have added substantially, "unless they arise out of the evidence produced against him." Without such qualification the charge of the Court was erroneous, and calculated to mislead the jury, notwithstanding the Judge may have given the instruction correctly in a former portion of the charge. *Dixon vs. State* 636

OCCUPYING CLAIMANTS—

1. The "act for the relief of occupying claimants," approved January 12, 1849, has no application to proceedings under the act relating to forcible entry and detainer. *Mountain vs. Roche*..... 581

OFFICE AND OFFICER—

1. Section 7, and Article V, of the Constitution of this State, provides that "when any office, from any cause, shall become vacant and no mode is provided by this Constitution, or by the laws of the State, for filling such vacancy, the Governor shall have power to fill such vacancy by granting a commission, which shall expire at the next election:" *Held*, That the power vested in the Governor by this section is not a power to fill any office for the *unexpired term*; that this power remains with the people, and that the power here conferred is to provide an incumbent for the office between the date of the removal or death of the regular incumbent, and the filling of the office by an election by the people. *State vs. rel. Weeks vs. Gamble Comptroller*..... 9

2. That while the Constitution does not fix the precise time for

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the "next election," yet it is the duty of the authorities to see that the time of this election is not indefinitely postponed at the expense of the rights of the people.—*Ibid.*..... 9

3. Where a provision is made by law for the salary of an officer, the drawing of a warrant by the Comptroller is a ministerial act, which may be enforced by mandamus, and the court may, in such proceedings, determine whether the appointment of the officer is void, where there is no other incumbent of the officer exercising its functions by color of right.—*Ibid.*..... 9

4. Where the statute prescribes a particular mode of serving the process, and that the officer's return shall show the precise manner of serving, a return stating that the process is "served on the within named party," is not sufficient to authorize the entry of a judgment or decree. The statute must be strictly pursued in such cases, otherwise the court has not jurisdiction of the person of the party to be served. *Standley vs. Arnow*..... 361
(See Sheriff.)

PARTNERSHIP—

1. *Held*, (by a majority of the court,) that the representatives of a deceased partner stand in the relation of a creditor of the surviving partner, who assumes control of the partnership effects, to the extent of the value of the interest of the deceased partner, after satisfying the partnership debts; and the doctrine that a voluntary gift or conveyance or a voluntary post-nuptial settlement by a person indebted is *prima facie* fraudulent as to the creditors of the debtor, applies as well in behalf of the representatives of the deceased partner as in behalf of general creditors. *Alston et al. vs. Rowles*..... 117

2. A bargains and sells to B one-half of a stock of goods not then in his actual possession. B bargains to pay A one-half of the cost of the goods, and one-half of the charges incurred and to be incurred thereon. The cost and charges are to be ascertained at a future time: *Held*, That acts remained to be done between buyer and seller before the sale could be considered complete, and that no present right of property passed. In the same instrument containing the above bargain and sale there was an agreement between the parties to sell the stock of goods as co-partners: *Held*, That it was necessary that a property should pass to the vendee before such partnership could exist *inter se*, and that the vendor had a right to insist upon payment for the goods before the vendee acquired an interest as partner: *Held further*, That acts which may be attributed to common courtesy and to the confidence which generally exists between persons who have agreed to enter into the intimate confidential relation of partners, should not be held to be a waiver of those conditions necessary to be performed before that relation is to exist under contract. *Johnston et al. vs. Eichelberger*..... 230

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PLEADING—

1. When a bill in chancery, in the prayer for process, does not contain the names of the defendants against whom process of subpoena is prayed, as required by Rule 23, (Chancery Rules,) it is demurrable, it being a defect in the frame of the bill. *Keen et al. vs. Jordan* 327

2. When a demurrer to a bill is filed without being accompanied by certificate of counsel as required by the 31st Chancery Rule, advantage of the omission should be taken by motion to strike off the demurrer; but if the parties proceed to a hearing without regarding the omission, and the questions raised by demurrer are passed upon by the court, it is too late, upon appeal, to raise the objection. —*Ibid.* 327

3. A statement in a bill for divorce that the complainant is, and has been for more than two years, a resident of this State; that the parties were married at Jacksonville, in this State, in April 1862, "where the parties have ever since lived," is a full compliance, as to the pleadings, with the statute, which requires that "it shall appear that such applicant has resided in the State of Florida for the space of two years prior to the term of such application," and is a sufficient allegation of the time of marriage.—*Burns vs. Burns*..... 369

4. Where a divorce is prayed on the ground that the defendant "is habitually intemperate," it is not necessary to specify more definitely the facts constituting "habitual intemperance," the charge of itself implying that the defendant has a persistent habit of becoming intoxicated from the use of strong drinks, and thus rendering his presence in the marital relation disgusting and intolerable.—*Ibid.*..... 369

5. Where the charge in a bill for divorce is that the defendant "habitually indulges in violent and ungovernable temper, and is extremely cruel to his wife," and proceeds to specify that he uses threatening, blasphemous and abusive language towards her, on many occasions threatened her with fatal violence, and attempted to carry his threats into execution, so that she has had to seek safety in flight; and in an amended bill reiterating these charges, it is alleged that the defendant has put and continues to keep complainant in fear of bodily harm from his violence and abuse: *Held*, That the defendant having taken direct issue upon these statements, and proceeded to a final hearing without requiring a more definite specification of facts, and the allegations appearing to be sufficiently definite to appraise the defendant of the nature of the facts to be proved in order to enable him to prepare his defence, and it appearing that the proofs fully substantiate the charge, a decree of divorce will be sustained.—*Ibid.* 369

6. Under the rules of practice in the Circuit Courts, the plea of not guilty in trover does not put in issue the plaintiff's title to the goods. Under this plea, defendant cannot introduce evidence in de-

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nial of property or right of possession in the plaintiff. None of the statutes of this State have changed this rule. *Robinson vs. Hartridge*, 501

7. The act to amend the pleading and practice of this State adopts certain forms for particular pleas, and enacts that the forms set forth shall be sufficient. The effect of the statute is to render the brief forms sufficient for all the purposes for which the more lengthy forms were required before the act; but the effect and operation of the plea is not extended beyond its effect anterior to the statute.—*Ibid.* 501

8. Defendant's counsel, misapprehending the effect of the plea of the general issue in trover, attempts to introduce, after the plaintiff has closed his testimony, evidence in denial of the plaintiff's title; it is objected to, and the objection is sustained; the defendant asks leave to file a special plea, putting the title in issue: *Held*, Under the statutes of this State, that the application to cure the defect is duly made, and if the question of title is involved in the determination of the true questions in controversy between the parties anterior to the trial, it is such an amendment as is authorized by statute, and made the duty of the court to allow.—*Ibid.* 501

9. A declaration alleging that a city council, "contriving and unjustly intending to injure, prejudice and aggrieve the plaintiff, and to incommode and annoy him in the occupation and enjoyment of his property," dug away his sidewalk, destroyed his shade trees, and created a nuisance in front of his premises, shows a cause of action at common law, the acts thus charged being in violation of law, and is not demurrable under the city charter which authorizes the grading and improvement of streets. *Dorman vs. the City of Jacksonville* 538

10. Under the rules, a plea of non-assumpsit is not a proper plea to a declaration upon a promissory note, but when the declaration contains other counts to which the plea of non-assumpsit is applicable, it is improper to strike out the plea as a nullity unless a *nolle prosequi* be entered as to the other counts. The rule that the plea of non-assumpsit shall not be interposed, relates to suits upon bills of exchange and promissory notes, where they are the only causes of action upon which the plaintiff declares. *Bemis vs. McKenzie* 553

11. A bill in chancery is not necessarily multifarious because it contains irrelevant or redundant matter. To render a bill multifarious, it must contain two or more good grounds of suit which cannot be properly joined in the same bill against the same or several defendants. *Ritch vs. Eichelberger et al.* 169

PRACTICE—

1. Where there has been a suggestion of insolvency filed in the County Court, and notice calling in creditors, one creditor has an

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equity to enjoin proceedings under a judgment at law obtained by another creditor, after suggestion of insolvency filed in the County Court. *Scarlett vs. Hicks et al.*..... 314

2. In such a case, the County Court, not having the power to enjoin execution of a judgment at law rendered by the Circuit Court, a Court of Chancery may grant relief by injunction without removing the administration of the assets to its own jurisdiction.—*Ibid.*..... 314

3. To such a proceeding the legal representative of the decedent is a necessary party. The omission to make him a party is not, however, a ground for the dissolution of the injunction. To such a proceeding, the sheriff, the officer of the court of law, is not a proper party, having no interest in the subject matter of the controversy. His being made a party improperly is, however, no ground for the dissolution of the injunction.—*Ibid.*..... 314

4. An injunction continues, under the practice in this State, for the time fixed by the order granting it, and, if no time is limited, until the hearing, unless it is sooner dissolved. There are no terms of the court for chancery proceedings. The court, under the statute, is always open for such proceedings, whether interlocutory or final. *Scarlett vs. Hicks, et al.*..... 314

5. That the Chancellor, before granting an injunction, has failed to require an exhibit of a claim alleged to be in writing, or in this case an exhibit of a copy of the claim filed in the County Court, and a copy of the proceedings in that court, is no ground for a dissolution of the injunction.—*Ibid.*..... 314

6. To dissolve an injunction where the only relief to be obtained is a perpetual injunction staying proceedings at law, is equivalent to dismissing the bill. In such a case as this, where there is abundant equity in the bill, where some of the defendants are non-residents, and where a subpoena has been issued and served upon one of the defendants in person, and upon the attorney of the non-resident defendants, the injunction should not be dissolved upon the ground of delay in prosecuting the suit.—*Ibid.*..... 314

7. That a party procures the entry of his appearance with the statement that his appearance is special, does not alter the effect of the appearance if he contests the suit upon its merits. If, notwithstanding this entry, he contests the suit upon its merits in the court below, obtaining a judgment in his favor, and upon an appeal to this court contests the appeal upon its merits, he is in court for all purposes, and upon remanding the case will be held to file his defences in the regular order of pleading.—*Ibid.*..... 314

8. When a bill in chancery, in the prayer for process, does not contain the names of the defendants against whom process of subpoena is prayed, as required by Rule 23, (Chancery Rules,) it is de-

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PRACTICE—(Continued.)

24. The requirements of a statute authorizing a transfer of a cause from one court to another must be strictly observed, and everything necessary to transfer jurisdiction under the statute must appear in the record of the cause.—*Ibid*..... 337
25. The fourth section of the act approved January 24, 1851, authorizing a judge of one circuit to make orders in suits pending in another circuit in vacation, when the judge of the latter circuit is under the disabilities mentioned in the act, is not in conflict with the Constitution of 1868.—*Ibid*..... 337
26. The order made by the judge of another circuit is *pro hac vice* the order of the court in which the cause is pending, and such order must be filed therein.—*Ibid*..... 337
27. An order of a circuit judge in a cause supposed to be pending in another circuit is void, unless the cause is pending therein at the time the order is made.—*Ibid*..... 337
28. When application is made to a judge for a writ of injunction upon bill filed, the judge should make an order requiring security to be given to protect parties who may sustain damages in consequence of the issuing of the injunction, and when, under the law of 1860, the party applying for the injunction makes affidavit that he is unable to give the required security, and that the statements in the bill are true, the judge is not authorized to grant the writ without requiring security, unless the party shall prove, *ex parte*, the truth of the statements of the bill and of the accompanying affidavit.—*Ibid*..... 337
29. The general rule is, that an application for a writ of injunction, or for the appointment of a receiver, must be upon notice to the opposing parties; yet, if the act to be prohibited be such that delay will be productive of serious damage, the writ will be granted or a receiver appointed *ex parte*. The emergency must be judged of by the chancellor in the exercise of a discreet judgment.—*Ibid*..... 337
30. When a suit in chancery is commenced in the second circuit, and an order is irregularly made transferring the cause to the third circuit, and owing to the absence of the judge of the latter circuit the papers are taken to and filed in a county in the fourth circuit, where proceedings are had in the cause, from which proceedings an appeal is taken, this court will reverse and set aside such proceedings, and direct that the papers be returned to the county where the suit was commenced.—*Ibid*..... 337
31. It is irregular, and sanctioned by no rule of Chancery practice, to direct a special issue as to the lunacy of a party upon particular dates to be tried in a court of law upon an *ex parte* petition of a friend of the lunatic. *Whitlock vs. Chandler*..... 385
32. Two methods of investigating the subject of the lunacy of a party are known to Chancery practice. One is where the matter

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of lunacy becomes a subject of inquiry in a cause pending. In this case the chancellor may and usually does direct an issue to be tried in a court of law to try the question of the lunacy of the party. The other is where a commission *de lunatico inquirendo* is awarded upon an *ex parte* petition of a friend of the alleged lunatic. Some of the incidents of each method considered.—*Ibid*..... 385

33. It is not necessary, under the laws of this State, that a bill of exceptions in civil causes should be sealed by the judge; the signing by him is sufficient. *Robinson vs. L'Engle*..... 482

34. A memorandum made by the clerk of the court, in taking down the testimony of witnesses, as that certain questions were asked and not allowed by the court, and exceptions taken, is not a part of the record and does not dispense with the preparation and signing of a bill of exceptions, in order to bring the matter before the appellate court.—*Ibid* 482

35. Where a plea is overruled on demurrer with leave to defendant to amend, and taking no exception to the ruling of the court, he files an amended plea, he thereby abandons his first plea and waives his right to take advantage of the ruling of the court upon the demurrer, and cannot assign it for error.—*Ibid*..... 482

36. An alternative writ of mandamus may be amended. *State ex rel. Bloxham vs. Board of State Canvassers*..... 55

37. Where an appeal is prosecuted by the "defendants now living," omitting individual names, and by a person who purports to be the legal representative of one who was a party to the decree, and such legal representative was never made a party to the proceedings either in the court below or in this court, it must be dismissed. The legal representative in such case is in no condition to prosecute the appeal, and the terms "defendants now living" fail to identify with requisite certainty the individuals whose interests are to be affected, should the court act. *Alston et al. vs. Rowles*..... 110

38. Where the paper filed in this court upon which an appeal is to be heard, is certified by the Clerk of the Circuit Court to contain "copies of original on file in the cause" in the Circuit Court, and it is apparent that only a portion of the proceedings is embraced in what is thus certified, a *certiorari* cannot be granted to supply the deficiency, and the case will be stricken from the docket. *Caulk vs. Fox and wife* 147

39. Royall made a *bona fide* sale to L. and M. of a judgment and execution which was a lien upon property covered by a junior mortgage, under which execution the mortgaged property was improperly sold, after the transfer of the judgment and execution. In a suit in equity, instituted for the purpose of foreclosing the mortgage, and to set aside the sale under the execution, it is not necessary to make the original plaintiff, who had so parted with his interest in the

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judgment and execution, a party to the foreclosure suit, as he had no legal or equitable interest in the matter. *Ritch vs. Eichelberger et al.*.... 169

40. A bill in Chancery is not necessarily multifarious because it contains irrelevant or redundant matter. To render a bill multifarious it must contain two or more good grounds of suit which cannot be properly joined in the same bill against the same or several defendants.—*Ibid.* 169

41. In a suit in equity to foreclose a mortgage given by E. to Ritch, it is proper to make parties all who have junior liens upon the mortgaged property, and all who have become purchasers under a prior lien, if such purchasers bought with notice of the equitable or legal rights of the mortgagee which were sacrificed by the improper proceedings of the officer making the sale, or of the owners of the lien under which the sale was made.—*Ibid.*..... 169

42. Bill of Exceptions must be made up and signed during the term, under the rules of practice in the Circuit Courts, in all cases except where, by special order, further time is allowed. Where the judge, in signing the bill of exceptions, certifies that the bill is made up and tendered for signature after the term, by his special leave and authority, it is presumed that special leave was granted during the term by an order of the court. *Robinson vs. Hartridge*..... 301

43. An appellate court will not review any action of the inferior court, involving a consideration of the whole testimony, unless the whole of the evidence is before the reviewing court; but it is not necessary that a bill of exceptions should, in precise words, state that all of the testimony introduced is embodied in it. Where the bill purports to contain the evidence which "the plaintiff gave in his behalf," and the evidence "given in behalf of the defendant," reciting after this statement the evidence offered, it is sufficient.—*Ibid.*..... 301

44. Where it appears from the record that an objection was noted to interrogatories, to be propounded to a witness to be examined upon commission, and the record is entirely silent as to any disposition made of these objections by the court, and the bill contains the answers of the witness, the presumption is that the party making the objection abandoned it, and that the deposition was read.—*Ibid.*..... 301

45. Under the statutes of this State, a total variance between the writ and declaration is no ground after verdict for an arrest of judgment in the court below, nor for a reversal of the judgment in this court.—*Ibid.* 301

46. Under the rules of practice in the Circuit Courts, the plea of not guilty in trover does not put in issue the plaintiff's title to the goods. Under this plea, defendant cannot introduce evidence in denial of all property or right of possession in the plaintiff. None of the statutes of this State have changed this rule.—*Ibid.*..... 301

47. The act to amend the pleading and practice of this State adopts

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certain forms for particular pleas, and enacts that the forms set forth shall be sufficient. The effect of the statute is to render the brief forms sufficient for all the purposes for which the more lengthy forms were required before the act; but the effect and operation of the plea is not extended beyond its effect anterior to the statute.—*Ibid.* 501

48. Under the rules, a plea of non-assumpsit is not a proper plea to a declaration upon a promissory note, but when the declaration contains other counts to which the plea of non-assumpsit is applicable, it is improper to strike out the plea as a nullity, unless a *nolle prosequi* be entered as to the other counts. The rule that the plea of non-assumpsit shall not be interposed relates to suits upon bills of exchange and promissory notes, where they are the only causes of action upon which the plaintiff declares. *Bemis vs. McKenzie*..... 553

49. After demurrer sustained to a plea, if the defendant by leave of the court files a new plea, he thereby abandons his former plea and the exceptions to the judgment on the demurrer; and the last plea being demurred to and the demurrer sustained, this court can review only the judgment upon the demurrer to the last plea. *Garlington vs. Priest*..... 559

50. After successive pleas have been held bad, on demurrer thereto, it is error to enter a judgment for want of a plea; the proper judgment is a final judgment on the demurrer.—*Ibid.*..... 659

51. The first section of "an act providing for the stay of executions in this State," approved Dec. 13, 1861, providing that "there shall be no sales under execution and judgments at common law or decrees in Chancery in this State, until twelve months after peace is made and proclaimed, or until otherwise provided by law, between the Confederate States of America and the United States of America, except by the consent of the defendant or defendants," provided, that in cases of levy the "defendant be required to give bond with security for the forthcoming of the property on or at the time above specified," is void as contravening the spirit of the constitution of the United States recognizing the establishment of the Confederate government, and contemplating the dismemberment and destruction of the Union of the States.—*Ibid.*..... 559

52. When a party has filed his pleas and they are pronounced insufficient upon demurrer, it is not a matter of course that the defendant may plead *de novo*. The judge should exercise a sound discretion in permitting new pleas to be filed, and should inspect the plea offered, and if it is a mere repetition of a previous plea or is not a good defence, or seems to be interposed for delay, or if there is any other like good reason, he should refuse leave to file it.—*Ibid.*..... 559

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PRACTICE—(Continued.)

53. Where the record contains a declaration in ejectment, a plea of the general issue and a joinder in issue endorsed in short form upon the plea without showing the date upon which the joinder in issue was added, the presumption is that it was in due time. *Bardin vs. L'Engle*..... 571
54. A bill of exceptions should be made up and signed during the term of the court at which the trial is had, unless by special order further time is allowed.—*Ibid*..... 571
55. The Circuit Court has by the Constitution final appellate jurisdiction in all civil cases arising in the County Court, in which the amount in controversy is \$100 and upwards; and a writ of error to the Circuit Court brought for the purpose of bringing the judgment of that Court affirming the judgment of the County Court in the case specified before the Supreme Court for review, is unauthorized, and must be dismissed for want of jurisdiction. *Brillis et al. vs. Blumenthal*..... 577
56. The proper way to proceed is to show by affidavit what the lost record contained, and by motion after personal notice of the intention to move the Court. The notice must be sufficiently explicit to advise the opposite party of what is intended, as well as to enable him to controvert the affidavits. *Pearce vs. Thackeray*..... 574
57. After an appearance and argument of the motion upon the merits, any irregularity in the service of the notice is cured.—*Ibid*..... 574
58. Where the bill of exceptions contains none of the evidence, nor an indication of the state of the facts upon which the Circuit Judge was asked to charge, nor any part of the charge of the Court, the judgment appealed from being conformable to the pleadings, no error is apparent in the record and the judgment must be affirmed. *Parsons et al. vs. Baxter*..... 580
59. Where the judgment of the Circuit Court is based upon a consideration of all of the testimony adduced, and none of the testimony is properly brought before this Court, the judgment must be affirmed. *Penny vs. Holmes*..... 579
60. Unless the record discloses so much of the proceedings as will show that an error was committed by the Court below upon the trial, it must be intended that the proceedings in that Court were correct. *Mountain vs. Roche*..... 581
61. When, before the adoption of the Code of Procedure, a cause was referred by the Circuit Court to a practicing attorney as referee, in pursuance of the 17th section of Art. VI of the Constitution, to be tried and determined by him; and upon a hearing of the cause upon the law and facts he made his decision and filed the same, with a record of his proceedings, in the office of the clerk of the Circuit Court, in vacation, such decision does not become a final

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judgment of the Court without further action of the Court thereon, and an appeal cannot be taken from the decision of the referee to the Supreme Court as from a final judgment. *Chambers vs. Savage et al.*..... 585

62. An appeal in a common law case lies only after a final judgment, and that final judgment must appear in the record otherwise than by a mere recitation of the fact in the bill of exceptions. *Anderson vs. Pres. Church*..... 592

63. Where the plaintiff asks and voluntarily submits to a non-suit, no appeal lies at his instance to this court. A court or review will not in such case on appeal reverse the judgment of non-suit, nor will it look into other questions presented by the bill of exceptions.—*Ibid* 592

64. An appeal is not "obtained" until all the requirements of the statute necessary to make it effectual are complied with; and in cases at law, the giving and approving of a bond is one of the prerequisites. *Thomp. Dig., 446. Hall et al. vs. Penny*..... 593

65. All the steps necessary to perfect an appeal, if the appeal be applied for during a term of the Circuit Court, must be taken during the term; and if the appeal be applied for in vacation, all the requirements of law must be complied with within ten days after the close of the term, otherwise an appeal is not "obtained" within the meaning of the statute.—*Ibid*..... 593

66. All the persons named as plaintiffs or defendants in a joint judgment, must join in prosecuting a writ of error, but if some refuse, the others may prosecute it in the names of all without their consent. *Stanley vs. Jaffray et al.*..... 596

67. When a bill of exceptions is signed by the judge it will be presumed that it was signed within the time prescribed by law, unless there is in the record some evidence to the contrary. *Doe ex dem. Magruder et al vs. Roe*..... 602

PRACTICE UNDER THE CODE—

1. A decision of the Circuit Court overruling a demurrer in an "action for the recovery of money only," is not such an "order, decision, or judgment," as authorizes an appeal before final judgment under section 10 of the Code of Procedure. *Barkley vs. Russ*..... 589
(See Practice, 70.)

PROCESS—

1. The Constitution of this State, (1868,) Article VI, Section 5, provides that "The court shall have power to issue writs of mandamus, certiorari, prohibition, quo warranto, habeas corpus, and also all writs necessary or proper to the complete exercise of the appellate jurisdiction. Each of the Justices shall have power to issue writs of habeas corpus to any part of the State," &c.: *Held*,

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That this is a general grant of power to use certain writs in the exercise of its jurisdiction, and that it is competent for the Legislature to prescribe the manner of obtaining and issuing process, and to provide that such process may be issued out of the Supreme Court in vacation as well as in term time; and the provisions of the Constitution do not repeal or invalidate acts of preceding Legislatures, authorizing Justices and Judges to allow supersedeas, writs of errors, and other process, and prescribing the effect of such process.—*State vs. Johnson*..... 33

2. When a bill in chancery, in the prayer for process, does not contain the names of the defendants against whom process of subpoena is prayed, as required by Rule 23, (Chancery Rules,) it is demurrable, it being a defect in the frame of the bill. *Keen et al. vs. Jordan* 327

3. Where the statute prescribe a particular mode of serving the process, and that the officer's return shall show the precise manner of service, a return stating that the process is "served on the within named party," is not sufficient to authorize the entry of a judgment or decree. The statute must be strictly pursued in such cases, otherwise the court has not jurisdiction of the person of the party to be served. *Standley vs. Arnow*..... 361

4. An appearance for the purpose of objecting to proceedings does not necessarily waive irregularities in the service of process.—*Ibid.* 361

5. An appeal by a defendant may be considered such an appearance in the cause that the Circuit Court, on the return of the cause, may proceed thereafter as though the appellant had been served with process.—*Ibid.*..... 361

PROMISSORY NOTE—

1. A promissory note indorsed after due, is transferred subject to the same conditions as to demand of payment and notice of dishonor as though it were indorsed before due. The indorsement is a conditional contract to pay in the event of a demand, or due diligence to make a demand, on the maker and his default.—*Bemis vs. McKenzie* 553

(See Vendor's Lien.)

RAIL ROAD BONDS—

1. The 22d section of the act known as the Internal Improvement Act authorized Boards of County Commissioners to subscribe for stock in railroad companies, and to issue bonds, bearing interest, for the purpose of paying the subscription, and requires the commissioners to levy an annual tax to meet the interest as it becomes due. The county of Columbia, in 1855, subscribed for such stock, and issued its bonds. Simultaneously the Supreme Court of the State, in

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a case before it involving the validity of the law, pronounced it constitutional, and the county continued the issuing of its bonds until the whole amount authorized was issued: *Held*, That upon application for a writ of *mandamus* against the commissioners to compel the levy of a tax to pay the interest, by a *bona fide* holder of coupons representing the interest due upon these bonds, they having been issued under the sanction of the highest judicial authority of the State, and the acquiescence of the people of the county, it is too late to question the constitutionality of the law and the validity of the bonds in the hands of a *bona fide* holder, and that a judgment of the court now, declaring the law unconstitutional, would not affect the bonds heretofore so issued, but would operate only upon the future. *County Commissioners Columbia County vs. King*..... 451

2. Bonds were issued by Columbia county, and afterwards a portion of her territory was detached and formed into new counties, and provision was made in the act of separation that the new counties should compensate the county of Columbia according to the relative and *pro rata* assessed valuation of the property in the territory detached: *Held*, That it is not necessary or practicable to make the new counties parties in a proceeding against Columbia County to enforce collection of the bonds.—*Ibid*..... 451

3. Severing a portion of the territory of a county by act of the Legislature, and the freeing of slaves by the sovereign power of the State, thus lessening the aggregate value of the taxable property in a county, does not constitute a taking of "private property for public use without just compensation."—*Ibid*..... 451

4. Coupons representing the interest of county bonds were issued by the County Commissioners, signed "S. L. Niblack," without an official designation, but it appearing that they were in fact regularly issued: *Held*, That the county was liable upon them.—*Ibid*..... 451

REAL ESTATE—

1. A free colored person was not, in the year 1863, prohibited by law from taking titles to or owning *real estate in this State*. *Budd vs. Long* 288

RECEIVER—

1. When an appeal is taken and a supersedeas allowed from an order appointing a receiver, *pendente lite*, the power of the Court making the order and its officers is suspended in reference to the order appealed from, and the order remains inoperative pending the appeal. Any action or proceeding by any person under such order, in disregard and defiance of the force and effect of the supersedeas, after notice thereof or after service of a writ of supersedeas, is a contempt of the authority and jurisdiction of the appellate Court.—*State vs. Johnson*..... 33

(See Practice.)

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RECEIVING STOLEN GOODS—

(See Instructions, 5.)

REFEREE—

1. When, before the adoption of the Code of Procedure, a cause was referred by the Circuit Court to a practising attorney as referee, in pursuance of the 17th section of Art. VI of the Constitution, to be tried and determined by him; and upon a hearing of the cause upon the law and facts he made his decision and filed the same, with a record of his proceedings, in the office of the clerk of the Circuit Court in vacation, such decision does not become a final judgment of the Court without further action of the Court thereon, and an appeal cannot be taken from the decision of the referee to the Supreme Court as from a final judgment. *Chambers vs. Savage et al.*.... 585

RE-ESTABLISHING LOST PAPERS—

1. The Circuit Court, independent of express legislation, has the power to re-establish a judgment roll or entry when the original record is lost or destroyed. *Pearce vs. Thackeray*..... 574

2. The proper way to proceed is to show by affidavit what the lost record contained, and by motion after personal notice of the intention to move the court. The notice must be sufficiently explicit to advise the opposite party of what is intended, as well as to enable him to controvert the affidavit.—*Ibid*..... 574

3. A bill in chancery was filed, praying that the record of a judgment at law and an execution thereon, which had been destroyed by fire, might be re-established or supplied by copies thereof, and that a copy of the execution might be placed in the hands of the sheriff in lieu of the one destroyed: *Held*,

4. On demurrer to the bill, that the power to supply a new record when the original has been lost or destroyed, pertains to the court in which the record was made, and is an inherent power in courts of general jurisdiction; and a court of equity has no jurisdiction to supply or establish the record of a court of law which has been lost or destroyed. *Keen et al. vs. Jordan*..... 377

RES ADJUDICATA—

(See Constitutional Law, 11.)

SALE—

1. A bargains and sells to B one-half of a stock of goods not then in his actual possession. B bargains to pay A one-half of the cost of the goods, and one-half of the charges incurred and to be incurred thereon. The cost and charges are to be ascertained at a future time: *Held*, That acts remained to be done between buyer and seller before the sale could be considered complete, and that no present right of property passed. In the same instrument containing

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the above bargain and sale there was an agreement between the parties to sell the stock of goods as co-partners: *Held*, That it was necessary that a property should pass to the vendee before such partnership could exist *inter se*, and that the vendor had a right to insist upon payment for the goods before the vendee acquired an interest as partner: *Held further*, That acts which may be attributed to common courtesy and to the confidence which generally exists between persons who have agreed to enter into the intimate confidential relation of partners, should not be held to be a waiver of those conditions necessary to be performed before that relation is to exist under contract. *Johnston et al. vs. Eichelberger*..... 230

2. The unauthorized sale of the property of another is a conversion; that the true owner is unknown; that the party making the sale believes that it was a consignment to him for sale, and that he retained the proceeds, subject to the order of the true owner, when discovered, is no justification for the unauthorized exercise of the acts of ownership involved in the sale, and does not cure the conversion. *Robinson vs. Hartridge*..... 501

3. A. sold to B. one hundred cattle of named age and part of a particular stock then running upon the range. B. paid the price agreed upon, and A. gave to him a delivery order upon his (A's) agent. C. with a knowledge of these facts, subsequently purchased of A. the balance of the particular stock. He (C.) took possession of the entire stock, and admitted to B. his right of property in and possession to the one hundred cattle: *Held*, That C. upon setting up a claim of exclusive ownership to the one hundred cattle, and upon denial of the right of B., was liable in trover to B. *Watts vs. Hendry* 523

SET-OFF—

1. A plea of *set-off* of damages sustained by defendant growing out of a conspiracy against him, entered into by plaintiff and others, will not be sustained on demurrer. A set-off can be allowed, in an action on contract, of matters only growing out of contract, express or implied. *Robinson vs. L'Engle* 482

2. Unliquidated damages resulting from a tort cannot be made available as a set-off in an action of assumpsit; nor is evidence of such a tort admissible under a plea of set-off of moneys had and received, or moneys due for goods sold and delivered. *Hall et al. vs. Penny* 601

SETTLEMENT—

1. While, according to the strict rule of the common law, a freehold estate cannot be created to commence *in futuro*, and antenuptial settlement by the husband of real property upon the wife, in consideration of marriage, under which a freehold estate is to vest in the wife upon the marriage, cannot operate as a feoffment

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at common law, yet the instrument will operate as a covenant to stand seized to the use of the person named, and a Court of Equity will secure the wife in the enjoyment of such estate as passes under the deed. *Caulk vs. Fox and Wife*..... 148

2. While equity will construe a marriage settlement differently from its terms, and vary their strict legal signification in many cases in favor of the issue, upon the presumed intention of the parties to provide for the issue, the same rule is not applicable where the contest is between collaterals, devisees under the will of the husband on the one side, and the wife on the other.—*Ibid*..... 148

3. In such a contest, if the words used in the preamble and premises of the deed operate to pass a fee simple, and the *habendum* of the deed is inconsistent with the grant in the premises, inconsistent with itself, and uncertain, and such a construction carries out what in the opinion of the court was the real intention of the parties under existing circumstances, the preamble and premises will control, and an estate in fee simple passes.—*Ibid*..... 148

SHERIFF—

1. A sheriff was required by a rule of court to report what action had been taken under an execution, and reported on oath that he had sold property of the defendant in judgment and execution, (who was an administratrix,) and had realized a sum of money from said sale, but that he had, before sale of the property, been notified of the fact that the administratrix had filed notice of the insolvency of the estate in the Probate Court, and that such notice of insolvency was on file in the records of said Probate Court; whereupon on the motion of the attorney of the plaintiffs in the judgment and execution, the court ordered the sheriff to pay over to the said attorney the money realized on said execution from such sale, or stand committed as for contempt, and the sheriff paid over said moneys under the order: *Held*, That the return of the sheriff that a suggestion of the insolvency of said estate had been duly made and filed in the Probate Court, tendered an issue to the rule, and the peremptory order to pay over the money to the attorney without inquiring into the truth of the return was an error, and if such suggestion of insolvency had in fact been filed by the administratrix, it was unlawful to direct the sheriff to pay the money to the attorney, as the money represented assets of the insolvent estate and should be distributed *pro rata* in the settlement. *Matthews, Sheriff, vs. Williams*..... 615

2. When money has been thus paid over, and the order is reversed or set aside, the court should require the money to be restored, and is clothed with power to enforce restitution by summary process.—*Ibid*. 615

(See Office and Officer.)

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SLAVES—

Per WESTCOTT, J.:

1. Where a bond was given in 1861 for the forthcoming of slaves levied upon by execution, the condition of which was that the slaves should be delivered twelve months after peace should be made and proclaimed between the Confederate States and the United States of America: *Held*, That the happening of the contingency mentioned was a condition governing the liability of the obligors, and that no breach of the condition having occurred, no action can be maintained upon the bond. *Carlington vs. Priest*..... 559

2. The abolition of slavery or the emancipation of the slave does not destroy the right of action which a vendor of the slave so emancipated has against the vendee who owned the slave at the time of his emancipation, and any action of a convention of this character which directs the courts to hold otherwise is void, as it impairs the obligation of the contract. *McNealy vs. Gregory*..... 417

(See Constitutional Law, 12.)

SPANISH GRANTS—

1. The volumes of "American State Papers," published under the authority of Congress, containing copies and translations of the original grants or concessions of lands by the Spanish government, are as valid evidence in the investigation of claims to lands in courts of justice as though they were authenticated in any other mode recognized by law. *Doe ex dem Magruder et. al. vs. Roe*..... 608

2. A copy of a document or record, duly certified by the officer legally in possession of the original, is lawful evidence, on general principles, equally with the original.—*Ibid*..... 602

3. The grants or concessions of lands made by the Spanish government, anterior to the treaty of cession whereby Florida was annexed to the United States, are deemed to have been ratified and confirmed by the eighth section of the treaty, without further action by Congress.—*Ibid*..... 602

SUPERSEDEAS—

1. A supersedeas granted upon an appeal from an order allowing a preliminary injunction and appointing a receiver *pendente lite*, suspends the operation of the order and prohibits the further action of the receiver in carrying out the mandate of the order from which the appeal is taken. *State vs. Johnson*..... 33

2. When an appeal is taken and a supersedeas allowed from an order appointing a receiver *pendente lite*, the power of the court making the order and its officers is suspended in reference to the order appealed from, and the order remains inoperative pending the appeal. Any action or proceeding by any person under such order, in disregard and defiance of the force and effect of the supersedeas,

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after notice thereof or after service of a writ of supersedeas, is a contempt of the authority and jurisdiction of the appellate court—
Ibid. 33

3. Where a decree of divorce has been passed, an appeal taken, and a supersedeas awarded, a court of equity should not award an injunction to control the operation of the supersedeas. *Burns vs. Sanderson and Burns*..... 381

SUPREME COURT—

1. The Constitution of this State, "(1868.) Article VI, Section 5, provides that "the court shall have power to issue writs of *mandamus*, *certiorari*, *prohibition*, *quo warranto*, *habeas corpus*, and also all writs necessary or proper to the complete exercise of its appellate jurisdiction. Each of the justices shall have power to issue writs of *habeas corpus* to any part of the State," &c.: *Held*, That this is a general grant of power to use certain writs in the exercise of its jurisdiction, and that it is competent for the Legislature to prescribe the manner of obtaining and issuing process, and to provide that such process may be issued out of the Supreme Court in vacation as well as in term time; and the provisions of the Constitution do not repeal or invalidate acts of preceding Legislatures, authorizing justices and judges to allow supersedeas, writs of error, and other process, and prescribing the effect of such process. *State vs. Johnson*..... 33

2. This Court has the power to grant a writ of *mandamus* directing the Board of State Canvassers to re-assemble and complete a canvass of the returns of votes cast at a State election where they have neglected to make a complete canvass of the returns in their possession. *State ex rel. Bloxham vs. Board of State Canvassers*..... 35
 (See Practice.)

TITLE TO LANDS—

1. A deed of conveyance of lands, executed by a person out of possession, is void as against a party holding adverse possession. *Doe ex dem. Magruder et al. vs. Roe*..... 602

2. A deed of conveyance executed by the Trustees of the Internal Improvement Fund does not carry with it a presumption that the title was in them, and that they could lawfully convey the premises. Their title is not original, and, like that of any other party, should be proved, and is subject to be overcome by a superior title. *Ibid.*..... 602

TREATY OF ANNEXATION—

1. The grants or concessions of lands made by the Spanish government, anterior to the treaty of cession whereby Florida was annexed to the United States, are deemed to have been ratified and confirmed by the eighth section of the treaty without further action by Congress. *Doe ex dem. Magruder et al. vs. Roe*..... 602

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TRESPASS—

(See Action, 5 and 6.)

TROVER—

1. When a party receives chattels from a carrier, under the belief that he has a general or special property in them, and ships them to distant markets in the name of a third party, but for his own benefit, such act is a conversion if he has no such general or special property and the act of shipment is unauthorized, or not ratified or agreed to by the true owner. *Robinson vs. Hartridge*..... 501

2. In trover, a demand and refusal established a conversation in no case where the defendant has not the possession of the property at the time of demand made.—*Ibid*..... 501

3. The general rule, as to damages in trovers, is the value at the time and place of conversion, with legal interest to the date of the verdict.—*Ibid* 501

4. Defendant's counsel, misapprehending the effect of the plea of the general issue in trover, attempts to introduce, after the plaintiff has closed his testimony, evidence in denial of the plaintiff's title; it is objected to, and the objection is sustained, the defendant asks leave to file a special plea, putting the title in issue: *Held*, Under the statutes of this State, that the application to cure the defect is duly made, and if the question of title is involved in the determination of the true questions in controversy between the parties anterior to the trial, it is such an amendment as is authorized by statute, and made the duty of the court to allow.—*Ibid*.....501

5. Under the rules of practice in the Circuit Court, the plea of not guilty in trover does not put in issue the plaintiff's title to the goods. Under this plea, defendant cannot introduce evidence in denial of all property or right of possession in the plaintiff. None of the statutes of this State have changed this rule.—*Ibid*.....501

6. The unauthorized sale of the property of another is a conversion; that the true owner is unknown; that the party making the sale believed that it was a consignment to him for sale, and that he retained the proceeds, subject to the order of the true owner, when discovered, is no justification for the unauthorized exercise of the acts of ownership involved in the sale, and does not cure the conversion.—*Ibid*. 501

7. If in such a case the act of sale is confirmed or consented to by the owner, and he afterwards objects to receiving the proceeds because the sale did not realize what he deemed the full value, he cannot recover in trover. If the sale was authorized and was fair, and there was no breach of duty, the form of action is assumpsit for the proceeds, and if there is a breach of duty in the act of sale, the form of action is a special action on the case.—*Ibid*..... 501

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TROVER—(Continued.)

8. A. sold to B. one hundred cattle of named age and part of a particular stock then running upon the range. B. paid the price agreed upon, and A. gave him a delivery order upon his (A.'s) agent. C., with a knowledge of these facts, subsequently purchased of A. the balance of the particular stock. He (C.) took possession of the entire stock, and admitted to B. his right of property in and possession to the one hundred cattle: *Held*, That C., upon settling up a claim of exclusive ownership to the one hundred cattle, and upon denial of the right of B., was liable in trover to B. Watts vs. Hendry..... 523

TRUSTEE—

1. Where the legal estate is in the trustee, actions founded upon the legal title must be brought in his name. So also has the trustee the right at law to institute all proceedings authorized by statute or otherwise, to redress injuries to his possession, and to evict defaulting tenants. Burns vs. Sanderson & Burns. 381

TRUSTEES OF INTERNAL IMPROVEMENT FUND—

1. A deed of conveyance executed by the Trustees of the Internal Improvement Fund does not carry with it a presumption that the title was in them, and that they could lawfully convey the premises. Their title is not original, and, like that of any other party, should be proved, and is subject to be overcome by a superior title. Doe *ex dem.* Magruder *et al.* vs. Roe..... 602

USURY—

1. The compounding of interest is not *usurious* under the laws of this State which limited the rate of interest. County Commissioners Columbia County vs. King..... 451

VENDOR'S LIEN—

1. In March, 1861, A agreed to purchase of B certain lots in Tallahassee, Florida, and improvements to be constructed thereon by B. The sum agreed to be paid was an estimated value of the lots and the actual cost of the improvements. After the execution of this agreement, B removes to the State of Maryland, leaving an agent in Florida. A remains in Florida, giving his personal attention to the work, having authority from B to make such additions or alterations in the original plan as he desired. Additions and alterations were made by A. In July, 1865, (between which date and the date of the completion of the improvements, communication between Maryland and Florida was suspended by war,) B, in Maryland, received a letter from his agent in Florida, and sought A, then in Maryland, for a settlement. A settlement was made, and a deed subsequently executed for the property. In making such settlement it was the expressed intention of neither party to suffer any

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considerable loss, nor to surrender any right under the original contract. Through a mistake in the construction of a sentence in the letter of the agent, a final settlement was had, and a note given for a much less sum than was due. This note B, with the consent of A, transferred to C, in payment of a balance due by him (B) for the lots which he (B) had purchased of C. The sentence erroneously construed related to the cost of the alterations in the original plan made by A, of which B was uninformed, and which, from the acts and language of A, he was authorized to believe were inconsiderable, while the proofs show they amounted to a considerable amount: *Held*, That in such a case a court of equity should open the settlement; that the true balance ascertained to be due was a balance of purchase money due upon a sale of real estate; that while the estate at law passed under the deed to the vendee yet in equity the vendor retained a lien for the balance of the purchase money. *La-Trobe et al. vs. Hayward*..... 190

2. That B, having used the note of A, given him in the settlement, to pay a balance due by him (B) to the party from whom he purchased the lots, did not affect his (B's) lien for the balance of the purchase money due him (B) by A, over and above the amount of the note.—*Ibid*..... 190

WITNESS—

1. A witness summoned to testify in behalf of the State before the grand jury, or before the Circuit Court, receives his compensation from the State, and not from the county. *State ex rel. Cruss vs. Edwards* 573

2. It is not error for the Court to refuse to allow the question to be put to a witness, "whether it was not possible that he might have misunderstood what the prisoner said." *Dixon vs. State* 636

3. It is error to allow a witness to give his "understanding" of the meaning of declarations made to him by a person accused of crime, unless the witness is an interpreter or expert.—*Ibid*..... 636

4. The question put to a witness, "would you deem a man to be of sound memory and discretion who, under the circumstances, would make use of such an expression as he made in your store?" was properly overruled.—*Ibid*..... 636

WRIT OF ERROR—

1. A writ of error is not the proper process to bring up for review an order or decree in a suit in equity; the only method known to our statutes is an appeal. *County Commissioners Columbia County vs. Bryson, et al.*..... 281

2. Unless the record discloses so much of the proceedings as will show that an error was committed by the Court below upon the trial, it must be intended that the proceedings in that Court were correct. *Mountain vs. Roche*..... 381

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WRIT OF ERROR—(Continued.)

3. All the persons named as plaintiffs or defendants in a joint judgment, must join in prosecuting a writ or error, but if some refuse, the others may prosecute it in the names of all without their consent.
Standley vs. Jaffray *et al.*..... 596



